POPULATION-BASED SENTENCING

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The institutionalization of actuarial risk assessments at sentencing reflects the extension of the academic and policy-driven push to move judges away from sentencing individual defendants and toward basing sentencing on population level representations of crimes and offenses. How have courts responded to this trend? Drawing on the federal sentencing guidelines jurisprudence and the emerging procedural jurisprudence around actuarial risk assessments at sentencing, this Article identifies two techniques. First, the courts have expanded individual procedural rights into sentencing where they once did not apply. Second, the courts have created procedural rules that preserve the space for judges to pass moral judgment on individual defendants. These responses exist in deep tension with policymakers' goals to shape sentencing outcomes in the abstract. While courts seek to preserve the sentencing process, advocates encourage the courts to manage the population-based sentencing tools. The courts' response is potentially problematic, as refusal to regulate the tools can undermine criminal administration. However, it presents an underexplored opportunity for courts and opponents of the recent trend toward institutionalizing actuarial risk assessments to jointly create the intellectual and policy-driven space for more fundamental, structural reforms relating to the U.S. criminal legal apparatus. This Article urges the courts and legal scholars to consider these alternatives going forward.

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INTRODUCTION

Law and policymakers increasingly encourage or require courts to consider actuarial risk assessment instruments ("RAIs," "risk assessments," or "tools") in the felony sentencing process.[1] These tools standardize the prediction of an individual's future behavior based on statistical analyses of historical data collected about past offenders' behavior.[2] This develop-

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[1] *See, e.g.*, TENN. CODE ANN. § 41-1-412(b) (requiring inclusion of a risk/needs assessment in the presentence reports provided to judges at sentencing); WASH. REV. CODE § 9.94A.500(1) ("Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release . . . the court may order the department [of corrections] to complete a risk assessment report" that shall be provided to the court if available before sentencing); 42 PA. CONS. STAT. § 2154.7 (2020) (adopting a statewide actuarial tool to predict individual defendants' recidivism risk at sentencing in Pennsylvania); 204 Pa. C. S. § 305. *See generally* MODEL PENAL CODE § 6B.09 (AM. LAW INST., Proposed Final Draft 2017) (encouraging states to institutionalize actuarial risk assessments at sentencing).

[2] ANEGÈLE CHRISTIN, ALEX ROSENBLAT & DANAH BOYD, COURTS AND PREDICTIVE ALGORITHMS 1 (2015), https://datasociety.net/wp-content/uploads/2015/10/Courts_and_Predictive_Algorithms.pdf [https://perma.cc/79FA-9HAW].

ment has caused great controversy as a matter of public policy and scholarly debate.[3]

As the tools proliferate at sentencing, scholars try to situate the trend within traditional sentencing reform frameworks. For example, the institutionalization of actuarial risk assessments may reflect the pendulum swing in penal theory toward consequentialist, forward-looking reforms rather than the backward-looking, retributive reforms that dominated in earlier decades.[4] Similarly, it may reflect the expansion of actuarial methods in the sentencing process.[5] Finally, this trend may reflect the expansion of transparent, system-level tools that enhance accountability in judicial decision making at sentencing.[6]

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3 The scope of the debate is wide, with a particular interest in the fairness of the tool design. *See, e.g.*, Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, (2019) (providing an overview of the debates). In the particular context of post-conviction sentencing, debates are taking a turn toward the courts as much scholarship and public discourse has emerged in the wake of the Wisconsin Supreme Court's 2016 decision in *State v. Loomis*, which considered and rejected several due process challenges to the use of a proprietary RAI at sentencing. 881 N.W.2d 749, 769-70 (Wis. 2016). *E.g.*, Michael Brenner et al., *Constitutional Dimensions of Predictive Algorithms in Criminal Justice*, 55 HARV. C.R.-C.L. L. REV. 267, 278–83 (2020) (critiquing the *Loomis* decision); Sharad Goel, Ravi Shroff, Jennifer Skeem & Christopher Slobogin, The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment 15 (Dec. 26, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306723 [https://perma.cc/3675-H6CL] (commending the *Loomis* court for addressing risk assessments at sentencing, but critiquing the court for its flawed reasoning); Danielle Citron, *(Un)fairness of Risk Scores in Criminal Sentencing*, FORBES (July 13, 2016, 3:26 PM), https://www.forbes.com/sites/daniellecitron/2016/07/13/unfairness-of-risk-scores-in-criminal-sentencing/#309a91754ad2 [https://perma.cc/278X-N72U] (commending the *Loomis* court for addressing risk assessments, but critiquing its approach based on automation bias); *see also* DANIELLE L. KEHL, PRISCILLA GUO & SAMUEL KESSLER, ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS AT SENTENCING 21 (2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33746041 [https://perma.cc/9D7P-HTLD] (same).

4 *See, e.g.*, Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 586, 592 (2018) (framing opposition to actuarial risk assessments as a matter of opposing the consideration of risk at sentencing, and emphasizing the theoretical and practical tensions between risk and culpability).

5 To that end, a particular binary around RAIs has emerged—between accuracy and fairness in the metrics that shape an assessment—upon which scholars and policymakers divide, and cannot agree. For exemplary scholarship on RAIs and equal protection doctrine, see Mayson, *supra* note 3, at 2262–81 (2019) (critiquing different interpretations of fairness metrics in RAI design); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1056–57, 1101–02 (2019) (critiquing the limits of equal protection doctrine in ensuring "racially just" algorithms in criminal administration).

6 Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 445 (2020) ("to change [judicial] behavior, it is not enough to adopt a technical

Each of these frames offers important insight to this moment. Yet, together or alone, each is insufficient to conceptualize the broader transformation in the nature of sentencing within which these tools make sense. While that transformation relates to the shifting orientation of punishment theory, it also pertains to the kind of knowledge we expect judges to prioritize at sentencing.[7] Similarly, a focus on technological advances in the tools' design take for granted the social changes that accompany it,[8] including to the way we expect judges to think at sentencing. Finally, thinking about actuarial risk assessments through a focus on transparency, accountability, and bureaucratic structure can obscure how efforts to make judicial sentencing transparent through creation of technical infrastructure have also, in turn, transformed the act of sentencing for judges. As a result, actuarial risk assessments are proliferating into sentencing processes, yet we lack a way to fully conceptualize the significance of this development in historical and sociological context.[9] This absence, in turn, limits the scope of critique and constrains our imagination of potential pathways forward in light of this development in this historical moment. Accordingly, this Article seeks to expand the frame.

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tool—attitudes towards the use of risk assessment in decision-making need to be addressed if the tool is to be used well."); Kevin R. Reitz, *"Risk Discretion" at Sentencing*, 30 FED. SENT'G REP. 68, 70–71 (2017) (noting that "[r]isk-based prison policy is as American as apple pie" and urging its "domestication" because "it is appalling that it has been administered with so little transparency or accountability").

7 KATJA FRANKO AAS, SENTENCING IN THE AGE OF INFORMATION: FROM FAUST TO MACINTOSH 67 (2005) ("The struggles over the exercise of sentencing discretion are . . . struggles about the format and nature of knowledge"); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 454 (1992) (noting that "the emphasis on the systemic and on formal rationality" definitive of the new penology occurred independent of the "pendulum swings of penal attitudes").

8 Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 589 (2019) (warning that the advance of technical reforms at sentencing distort social conceptions related to punishment and mass incarceration) [hereinafter Eaglin, *Technologically Distorted*]; *see generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188–92 (2007) (warning that the advance of the actuarial distorts social conceptions of punishment).

9 *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 167 (2001) ("[W]hen considering the [crime control] field as a whole, we need to bear in mind that these new practices and mentalities co-exist with the residues and continuations of older arrangements. . . . History is not the replacement of the old by the new, but the more or less extensive modification of one by the other.").

This Article asserts that the institutionalization of actuarial risk assessments at sentencing reflects the extension of a larger, historically situated push to move judges away from passing moral judgment on individual defendants and toward basing sentencing on population-level representations of crimes and offenses. This trend exists in deep tension with the aims and design of the traditional sentencing process. Courts address that tension through procedural sentencing jurisprudence. This Article draws on the federal sentencing guidelines jurisprudence and the emerging jurisprudence around actuarial risk assessments at sentencing to illuminate the ongoing tension between courts and RAI advocates in this moment. Further, by situating the jurisprudence in the frame of population-based sentencing, it identifies obscured possibilities in the jurisprudence worthy of further exploration in the literature going forward.

The institutionalization of actuarial risk assessments at sentencing encourages judges to engage in population-based sentencing. It substantiates a larger academic and policy-driven push for judges to sentence based on surface, population-level representations of crimes and offenders rather than to pass moral judgment based on an understanding of individual defendants at sentencing. This development fits within a larger, historical shift that creates tensions with the traditional sentencing process. While that process is designed for judges to pass moral judgment on individual defendants, much about the nature of sentencing changed in the late twentieth century. Sentencing reforms like sentencing guidelines encouraged judges to base sentences not on the peculiar characteristics of the offender and the offense, but population level representations of the crime.[10] Actuarial risk assessments do the same, by further abstracting the offender through population-level representations.[11] By describing RAIs as part of the trend toward population-based sentencing, this Article provides a way to conceptualize important continuities between this development and the history of sentencing that may otherwise be concealed.

The Article uses the population-based sentencing frame to offer new insight to the emerging jurisprudence around the use of actuarial risk assessments in state courts. Drawing on the jurisprudence that developed around the federal sentencing guidelines for insight, this Article identifies two techniques that

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10 *See infra* subpart I.A.

11 *See infra* subpart I.B.

the courts employ when responding to the trend toward population-based sentencing. First, the courts have expanded individual defendants' procedural rights when a population-based sentencing tool is implemented in a way that directly reduces a judge's ability to pass moral judgment on individual defendants at sentencing.[12] To the extent that defendants and scholars ask courts to recognize new individual rights at sentencing now in the face of actuarial risk assessments' expansion, state courts likely have not done so because the tools have not been implemented in a way that reduces the potential for judges to pass moral judgment at sentencing.[13] Second, the courts have responded to the trend toward population-based sentencing by creating procedural rules that create the space for judges to continue to pass moral judgment on individual defendants at sentencing.[14] Some state courts have created new procedural rules to preserve this space through the jurisprudence on actuarial risk assessments at sentencing; others would carve out that space without a new rule.[15]

There is a tension between the techniques courts adopt and the trend toward population-based sentencing. While courts try to preserve the traditional sentencing process and maintain the space for judges to pass moral judgment on individual defendants, scholars and advocates encourage courts to start managing the population-based tools through the sentencing process.[16] The courts are not doing this. We can understand this trend in the jurisprudence as perilous, and for good reason. Population-based tools influence judges; the tools often lack important oversight in their design; and their orientation around prevention threatens to frustrate traditional criminal justice values.[17] This Article suggests that the trend in the jurisprudence presents obscured promise, too. Maintaining the sentencing process and preserving the space for judges to keep passing judgment on individual defendants in social context is itself a critique of the political and cultural assumptions that sustain the trend toward population-based sentencing.[18] This critique can align with the deeper, structural critiques that many opponents to RAIs raise in the era of

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12 *See infra* subpart II.A.

13 *See infra* subpart II.B.

14 *See infra* subpart III.A.

15 *See infra* subpart III.B.

16 *See infra* Part IV.

17 *See infra* subpart IV.A.

18 *See infra* subpart IV.B.

mass incarceration. This Article invites scholars to think more critically about these possibilities going forward.

This contribution provides new insight to both the literature on RAIs and the literature on mass incarceration. While there is much interest in how the courts' respond to RAIs at sentencing, scholarship tends to orient around the tools' design.[19] Analyzing the jurisprudence through a historically- and sociologically-rich lens focused on sentencing invites scholars to think more broadly about the significance of the emerging jurisprudence in this historical moment. While RAIs' opponents launch policy-driven and equal-protection based critiques of the tools as a response to mass incarceration, they can overlook the possibilities in the procedural jurisprudence around population-level sentencing.[20] This Article invites RAI critics to see the emerging state sentencing jurisprudence as a foundation to critique this historical present. By framing this development as part of the trend toward population-based sentencing, it foregrounds the qualitatively different kind of sentencing process grounded in human judgment of individual offenders that judges try to preserve, but lack the vocabulary to articulate. Further, it encourages courts and scholars to see the trend toward population-based sentencing as a political and cultural act that only makes sense in a particular social context defined not by mass incarceration, but structural insecurity.[21] The Article urges critical reflection on this social reality going forward, and illuminates the way that the jurisprudence creates space for such reflection.

This Article proceeds in four parts. Part I describes the historical foundation of the sentencing process, and situates actuarial risk assessments within the larger trend toward pop-

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19 *See, e.g.*, Brenner et al., *supra* note 3, at 279 ("The question is whether this 'black box' methodology [in actuarial risk assessments] violates the due process rights of criminal defendants by denying them the opportunity to challenge their output risk scores, or the means by which those scores were calculated.").

20 *See, e.g.*, Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806, and 816 n.50 (2014) (arguing that relying on actuarial risk assessments at sentencing "amounts to overt discrimination" and violates the Equal Protection Clause and dismissing the potential of the Sixth Amendment to address the equality-based concerns with the design of actuarial risk assessments used at sentencing). For a recent exception to this assertion, see Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611 (2020) [hereinafter Huq, *Human Decision*]. While his exploration of the Sixth Amendment jurisprudence centers on its implications for the individual's right to a human reviewer of increasingly complex, automated government decisions, *see id.* at 617, this Article is concerned with how the courts use individual rights to resituate and assert the judge's role as decision maker at sentencing.

21 GARLAND, *supra* note 9, at 168.

ulation-based sentencing. Part II demonstrates that courts expand individual defendants' procedural rights at sentencing in response to this trend. Part III demonstrates that courts create procedural rules to preserve the space for judges to pass moral judgment on individual defendants in the face of this trend. Part IV identifies the tension between how courts are responding to actuarial risk assessments at sentencing, and how advocates of the trend want courts to respond to the tools. It identifies perils in this tension. It also identifies a yet underexplored interest convergence between courts and RAIs' opponents illuminated by the jurisprudence and worthy of further exploration going forward.

I
THE HISTORICAL PRESENT

A. Procedure Light Sentencing and the Move toward Population-Based Sentencing

For most of the twentieth century, states and the federal government maintained discretionary sentencing structures.[22] In a typical discretionary structure, a judge would conduct a sentencing hearing separate from the defendant's trial of conviction.[23] At the sentencing hearing, the judge would receive information about the defendant's personal background, their criminal history, and details about the offense through a presentence report before imposing an individualized sentence tailored to the defendant.[24] The judge was constrained by the statutory sentencing range—meaning the sentence could not fall above the statutory maximum or the statutory minimum set by the legislature—but those ranges were typically quite broad.[25] A parole board would determine the actual amount of time a defendant served.[26]

Under this structure, the entire sentencing process was "predicated on the fundamental understanding" that a judge would pass moral judgment upon each individual defendant.[27]

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22 Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 382, 392–93 (2005).

23 Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 190 (2014). For a brief history of presentence reports in both state and federal courts, see John P. Higgins, *Confidentiality of Presentence Reports*, 28 ALB. L. REV. 12, 12–13 (1964).

24 *See id.*

25 *Id.*

26 Chanenson, *supra* note 22, at 384–85.

27 KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78-82 (1998) (describing the sentencing process in the federal

Accordingly, judges retained broad sentencing discretion and defendants, in turn, enjoyed minimal procedural protections.[28] *Williams v. New York* is the emblematic decision on this point.[29] There, the U.S. Supreme Court rejected a due process challenge to a sentence based on concerns that the judge considered out-of-court statements contrary to the defendant's right to confront his accusers.[30] The decision was grounded in the rehabilitative ideal.[31] It emphasized that procedural protections were counterproductive to the individualizing, discretionary act of sentencing.[32]

At the end of the twentieth century, law and policymakers radically transformed sentencing. The process itself remained the same—sentencing hearings continued and defendants still enjoyed minimal procedural rights—but the nature of sentencing changed. The rehabilitative ideal as a guiding theory of punishment declined.[33] The idea of judges passing moral judgment upon individual defendants became a thing to fear rather than a thing to celebrate.[34] Policymakers across the country

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system before creation of sentencing guidelines as one "predicated on the fundamental understanding that only a person can pass moral judgment, and only a person can be morally judged.").

28 Hessick & Hessick, *supra* note 23, at 190–91.

29 337 U.S. 241 (1949).

30 *Id.* at 251.

31 *Id.* at 248–49 ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence. Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes.").

32 *Id.* at 249 ("Under the practice of individualizing punishments, investigational techniques have been given an important role.").

33 Empirical research and scholarship also emerged in this time period that critiqued rehabilitation. *See, e.g.*, Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). For a recent account of the decline then transformation in notions of rehabilitation in criminal administration, see Eaglin, *Technologically Distorted*, *supra* note 8, at 517–23. Notably, the intellectual foundation for the change in sentencing emerged through a turn away from rehabilitation toward retribution-oriented policies. *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 41-42 (1976) (advocating a turn from rehabilitation to "just deserts"). The idea was that such a turn would reduce criminal incarceration sentences. *Id.* at 43 (suggesting the turn would create a foundation to "set reasonable limits to the extent of punishment"). In reality, it did not. Incarceration in the United States soared starting in the 1970s until 2009. *See* E. ANN CARSON, PRISONERS IN 2013 1 fig. 1 (2014) (showing the increase in state and federal prison populations between 1978 and 2009).

34 STITH & CABRANES, *supra* note 27, at 17 ("The reformers of our day fear that discretion leads to unduly disparate sentences for similar crimes by similar offenders."). The broad discretion allocated to judges in a discretionary sentencing structure came under attack from the left and the right. From the left, critics argued that sentencing outcomes were arbitrary, and from the right, critics argued that sentencing outcomes were too lenient. *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 108–11 (2014) (discussing the

implemented sentencing reforms to constrain judicial sentencing discretion. For example, states and the federal government expanded mandatory minimum penalties.[35] These statutes required particular sentence outcomes, usually to a term in prison, based on specific factors present in the commission of an offense.[36] Several states and the federal government also created sentencing guidelines.[37] Under the guidelines, criminal statutes remained the same, meaning broad ranges existed for most offenses of conviction, but legislatures and commissions narrowed the range within which judges were expected to sentence an individual based on predetermined administrative diktats concerning the offense and the offender's criminal history.[38]

These reforms encouraged or required judges to sentence based on population-level representations of criminal offenses. These reforms tried to fix sentences well in advance of the instant case. Sentencing guidelines, in particular, introduced a "large degree of impersonality" to the sentencing process by focusing the judge's attention on the "*nomenclature* of crimes" rather than the social context of their commission.[39] Following Professor David Garland, these sentencing reforms "rendered [the offender] more and more abstract, more and more stereotypical, more and more a projected image rather than an individuated person."[40] In so doing, guidelines, like other sentencing reforms of that moment, "extended the distance between the effective sentencer (in reality, the legislature or the sentencing commission) and the person upon whom the sentence is imposed."[41] In effect, "the individualization of sentencing [gave] way to a kind of 'punishment-at-a-distance'" wherein judges were less likely to sentence based on "the peculiar facts of the case and the individual characteristics of the offender."[42]

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shortcomings in "disparity" as a basis for sentencing reform in the federal system).

35 Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 229 (Michael Tonry & Richard S. Frase eds., 2001).

36 *Id.*

37 *Id.* at 222, 225–26 tbl. 6.1 (describing the commission and guidelines approach to sentencing reform throughout the states).

38 *See* Hessick & Hessick, *supra* note 23, at 190.

39 AAS, *supra* note 7, at 20–21.

40 GARLAND, *supra* note 9, at 179.

41 *Id.*

42 *Id.*; *see also* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991) (identifying "the movement from individualized to aggregated sentences" embodied by guideline regimes in federal and state systems and arguing that this trend "has marked a

These population-based sentencing reforms raised concern that procedural protections, once scant at sentencing, had become necessary.[43] Despite initial resistance in cases like *McMillan v. Pennsylvania*,[44] the U.S. Supreme Court issued a series of decisions in the 2000s that would bring more constitutional criminal procedure to bear on noncapital sentencing.[45] The Court subsequently ruled that procedural protections depend on the kind of sentencing structure a jurisdiction maintains.[46]

Thus, procedural rights in the noncapital felony sentencing context remain minimal.[47] Some procedural protections apply to all convicted persons regardless of the sentencing structure. For example, the right to counsel and the due process right to be heard apply to persons convicted of felonies in all jurisdictions.[48] In a "mandatory" sentencing structure, where sentence outcomes are "specif[ied] . . . based on particular facts," defendants have additional procedural protections.[49] These include the right to a jury determining sentencing facts beyond a reasonable doubt if that fact is necessary to impose a higher sentence than could be imposed under either the statute or the guidelines in the absence of that fact,[50] and the right to notice

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backward step in the search for just criminal punishments.") [hereinafter Alschuler, *Failure of Sentencing Guidelines*]; Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723, 734–35 (1993) (emphasizing his critique of data-driven, state sentencing guidelines).

43 *See, e.g.*, Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147, 157 (1993) ("The absence of procedural protections may well have been reasonable when sentencing was not a truly legal decision. In a discretionary sentencing scheme dominated by at least a rhetoric of rehabilitation, the sentence was not a product of any findings of fact about the nature of the offense, but rather a product of the judge's intuition about the defendant's prospects for rehabilitation. . . . The current situation is quite different.").

44 477 U.S. 79, 91 (1986).

45 *See, e.g.*, United States v. Booker, 543 U.S. 220, 236–37 (2005) (recognizing that the introduction of sentencing guidelines created "new circumstances" that led the Court to the answer new questions of procedure "developed in *Apprendi* and subsequent cases.").

46 Hessick & Hessick, *supra* note 23, at 188.

47 Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1775–78 (2003) (arguing that the volume of procedural trial rights applicable at sentencing further the goal of a "best estimate" in sentencing); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47 (2011) (building on Michaels' "best estimate" framework).

48 *See* Mempa v. Rhay, 389 U.S. 128, 137 (1967) (right to counsel); Glover v. United States, 531 U.S. 198, 203–04 (2001) (right to effective assistance of counsel).

49 Hessick & Hessick, *supra* note 23, at 188.

50 *Booker*, 543 U.S. at 230.

of facts that a judge will consider to enhance the sentence.[51] The ex post facto clause applies in such structures as well.[52] The rules of evidence do not apply at sentencing, though courts generally adhere to some minimal expectations of relevance and reliability in the evidence considered.[53]

B. Actuarial Risk Assessments as the Extension of Population-Based Sentencing

Today, law and policymakers are embracing the institutionalization of actuarial risk assessment instruments into state sentencing processes across the country. These tools standardize the prediction of an individual's future behavior based on statistical analyses of historical data on past offenders' behavior. RAI developers identify statistical correlations between group traits and group criminal offending rates to select objective predictive risk factors.[54] Common predictive factors that enhance a defendant's risk score include criminal history, age, gender, and socioeconomic factors like education, family ties, and antisocial behavior.[55] Actuarial instruments—whether produced as a checklist or through a computer-generated survey—use the presence of select predictive risk factors to assess the likelihood that a person will engage in criminal behavior defined as "recidivism" in the future.[56] Rather than communicate the assessment as a statistical number, most tools offer a qualitative assessment.[57] Thus, tools tend to classify persons as low-, medium-, or high-risk of engaging in certain future behavior.[58]

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51 Burns v. United States, 501 U.S. 129, 132 (1991).

52 Peugh v. United States, 569 U.S. 530, 543–44 (2013).

53 *E.g.*, FED. R. EVID. 1101(d) (evidentiary rules do not apply to sentencing proceedings); U.S. Sentencing Guidelines Manual § 6A1.3 cmt. ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rule of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."). State courts maintain similar expectations. *See, e.g.*, N.Y. CRIM. PROC. Law § 400.15(7)(a) (McKinney) (providing restrictions on sentencing evidence in New York).

54 BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 17–18 (2007) (emphasizing that actuarial risk assessments "rely on statistical correlations between a group trait and that group's criminal offending rate" to "determine criminal justice outcomes for particular individuals within those groups").

55 Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 240–41 (2015).

56 Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 68 & n.41 (2017) [hereinafter Eaglin, *Constructing*].

57 *Id.* at 86.

58 *Id.* at 86–87.

Like earlier efforts to formalize judicial decision making, these tools encourage judges to engage in population-based sentencing. Their expansion prioritizes "a certain mode of thinking [at sentencing] which is based on working on the surface, rather than on in-depth understanding."[59] Actuarial risk assessments do not convey information about the circumstances that bring a defendant into the courtroom nor what that individual will do after sentencing, whether incarcerated or not. Rather, it provides a static prediction of the likelihood that populations similarly situated to the defendant would engage in future behavior at the moment the assessment is administered.[60] Thus, like guidelines before them, this population-based sentencing tool obscures the peculiar facts of the case and the individual characteristics of the actual offender appearing before a judge. While earlier reforms encouraged judges to base sentencing decisions on population-level representations of crime, the institutionalization of actuarial risk assessments abstracts through population-level representations of the offender.

Thus, sentencing guidelines and actuarial risk assessments share important similarities, but also differ in significant ways. Though both mandatory minimums and sentencing guidelines contained an element of prediction in their design, actuarial risk assessments enhance that feature.[61] Like sentencing guidelines, RAIs are meant to constrain judicial discretion without changing sentence statutes. Unlike many guidelines that were implemented to shape sentence outcomes directly, to date, RAIs "reduce discretion, not in a direct way but by 'nudging' judges, prosecutors, and other court staff to

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59 AAS, *supra* note 7, at 5.

60 Numerous RAIs exist, and a variety of tools appear at sentencing. Some tools predict future arrest and others predict future conviction. Eaglin, *Constructing*, *supra* note 56, at 71–72. While most tools predict future behavior, newer tools may assess a person's "risk-needs" as well. *See* Hamilton, *supra* note 55, at 238–39 (describing "fourth generation" risk-needs-responsivity assessments). While these newer tools rely on "dynamic," meaning mutable, risk factors, the prediction itself is static. Slobogin, *Principles*, *supra* note 4, at 593 (urging the use of risk assessments that use "dynamic, or 'causal risk factors,' such as drug abuse or impulsivity" because "these are risk factors that can be changed through intervention and thus focus on traits that the person can do something about.").

61 Many states already use criminal history as a crude predictor of risk in their state sentencing structures. *See* HARCOURT, *supra* note 54, at 88–100 (2007); Eaglin, *Constructing*, *supra* note 56, at 67–68; Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 539–46 (2014). For a discussion of the ascendance in actuarial thinking more broadly in criminal administration, see generally HARCOURT, *supra* note 54, at 39–107 (describing the historical rise of actuarial methods in criminal law administration).

follow the predictions of the algorithm."[62] While several sentencing guidelines aggregated historical data on past sentencing practices, RAIs rely on more historical data that does not necessarily relate to sentencing,[63] blameworthiness,[64] or even criminal administration.[65] Further, the tools are increasingly complex, meaning now or in the near future, no one, not even the tool designer, may understand why a defendant is classified in a particular risk category.[66] Finally, many of the popular RAIs used in the states are proprietary in nature.[67]

An expansive literature now considers actuarial risk assessments in criminal administration, with a particular focus on its implications in the post-conviction sentencing context. Yet, none engage with the tools in this way. Rather, scholarship orients around three different frames when discussing the institutionalization of actuarial risk assessments at sentencing. First, many engage with the "risk" aspect of the tools.

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62 *See* CHRISTIN et al., *supra* note 2, at 6–7.

63 Eaglin, *Constructing*, *supra* note 56, at 104. *C.f.* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 989, 1007–08 (2019) (critiquing actuarial risk assessments that rely on arrests as predictive factors and a prediction outcome undermine the significance of the stage that is supposed to lie between arrest and adjudication—including judicial dismissals in furtherance of justice); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 332 (2017) (explaining the significance of judicial dismissals "in furtherance of justice").

64 *See* John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLIN. PSYCHOL. 489, 501–05 (2016) (explaining the tensions between actuarial risk tools' design for sentencing and the civil context on the basis of blameworthiness); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 427–28 (2006) (arguing that actuarial risk assessments used at sentencing should include only predictive risk factors that pertain to blameworthiness).

65 For example, the Pennsylvania Sentencing Commission considered including information like county of origin in its actuarial risk assessment at sentencing. *See* PA COMM'N ON SENT'G, SPECIAL REPORT: IMPACT OF REMOVING AGE, GENDER, AND COUNTRY FROM THE RISK ASSESSMENT SCALE 1 (2015) (examining the impact of removing age, gender, and county of origin from an actuarial risk assessment and concluding that each demographic factor should be included to preserve predictive accuracy). The commission did not adopt this predictive factor in its tool due to public backlash. *See* Eaglin, *Constructing*, *supra* note 56, at 113.

66 Current actuarial risk assessments use predetermined rules to predict predefined outcomes, but there is some interest in the application of machine learning tools to criminal administration, and sentencing specifically. *See, e.g.*, Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT'G REP. 222 (2015) (exploring the possibility to improve accuracy in risk predictions).

67 *See Constructing*, *supra* note 56, at 69–71 (noting that some tools used at sentencing are developed by sentencing commissions while others are created by publicly funded organizations); *see also* Andrea Nishi, Note, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1688–90 (2019) (highlighting the various obscured, subjective decisions of private developers and proposing alternative ways for courts to provide oversight to their development).

Thus, scholarship considers RAIs as part of a larger shift from a backward-looking, retribution-oriented era of reform toward a forward-looking, consequentialist-oriented era.[68] Second, many engage with the "actuarial" aspect of the tools. Thus, much scholarship adopts an almost compulsive focus on "new" issues relating to technical design or the nature of prediction in criminal administration.[69] Finally, many engage with actuarial risk assessments as system-level tools to bring transparency and accountability to the judicial decision making process. Thus, scholarship considers how to implement and design actuarial risk assessments in criminal administration to best control sentencing outcomes.[70]

While each of these frames is important, they are together and alone insufficient to conceptualize the significance of actuarial risk assessments' institutionalization in the felony sentencing process. Each offers insight to challenges that the tools present in this current moment. Yet, by situating actuarial risk assessments in isolation, as a new solution in this current moment or an old reform with a new twist, each frame invites scholars to selectively draw upon different continuities with the past that obscure a larger view of the present. For example, thinking about the tools as a return to consequentialist reforms obscures the ways that this new kind of consequen-

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68 *See, e.g.*, Slobogin, *Principles*, *supra* note 4, at 592 ("*if*, as this article is assuming, risk is a legitimate sentencing factor . . . the premise that punishment is only about what people have done no longer applies. . . . Risk assessments are orthogonal to culpability assessments, both conceptually (the first is forward-looking, the second is backward-looking), and practically (for instance, a single prior robbery conviction might call for more enhancement on desert grounds than on risk grounds)."); *see also* Monahan & Skeem, *supra* note 64, at 508 (summarizing the issues relating to actuarial risk assessments at sentencing as a matter of utilitarian versus blameworthiness concerns).

69 *See, e.g.*, Brenner, *supra* note 3, at 268 (framing discussion around artificial intelligence and algorithmic tools); *see also* Huq, *Human Decision*, *supra* note 20, at 618 (framing the rise of actuarial risk assessments in the larger technological milieu of the moment). This literature in particular tends to explore the use of technical risk assessments in criminal administration more broadly, rather than limiting the scope to post-conviction sentencing. For exemplary scholarship thinking about pretrial bail determinations and the design of actuarial risk assessments, see Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 687 (2018) (critiquing the definition of risk for actuarial tools used in the pretrial bail context).

70 *See, e.g.*, Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 476–83 (2020) (considering ways to convey risk information to improve judicial use of the information and identifying several ways to shape sentence outcomes through institutionalization of actuarial risk assessments in the pretrial and post-conviction sentencing context); Reitz, *supra* note 6, at 70–71 (describing the Virginia sentencing guidelines as a model of efforts to domesticate risk assessments and urging a "ratchet down approach" to their use at sentencing).

tialism is completely different from the old form we abandoned in the 1970s. That transformation pertains to the kinds of sentences we expect judges to produce;[71] it also pertains to the kind of knowledge we expect judges to prioritize at sentencing.[72] Similarly, a focus on technological change takes for granted the social changes that accompany it,[73] including to the way we expect judges to think at sentencing. Finally, thinking about actuarial risk assessments through a focus on transparency, accountability, and bureaucratic structure can erase the historically distinctive position of the judge at sentencing when situated within the larger sphere of criminal administration.[74]

In short, the existing frameworks fail to fully capture social and historical transformations in the nature of sentencing. Yet seeing the bigger picture is critically important to understanding and critiquing the present. Thinking about the tools as part of the trend toward population-based sentencing allows us to engage with these continuities and discontinuities more fully. It creates space to acknowledge that efforts to formalize sentencing change the nature of sentencing, and actuarial risk assessments intensify that transformation. It also creates space to recognize that while the sentencing process remains the same, our expectations of judges are quite transformed. Actuarial risk assessments intensify that transformation as well.

The population-based sentencing frame is particularly important as the debates about actuarial risk assessments shift toward the courts. Actuarial risk assessments raise a series of concerns at sentencing that defendants are challenging in state

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71 Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 194 (2013) (describing the shortcomings in embracing a new kind of rehabilitation grounded in economic-style rationales like cost saving and effectiveness to reduce mass incarceration); *see also* GARLAND, *supra* note 9, at 176 (describing the redefinition of rehabilitation).

72 AAS, *supra* note 7, at 67 (suggesting that, despite the claim that sentencing reforms lack coherent theory, "[c]oherence lies in the fact that the ideas and concepts which are, or can be, formatted tend to be given priority.").

73 Jessica M. Eaglin, *Technologically Distorted*, *supra* note 8 (warning that the advance of technical reforms at sentencing distort social conceptions related to punishment and mass incarceration); *see generally* HARCOURT, *supra* note 54, at 188–92 (warning that the advance of the actuarial distorts conceptions of punishment).

74 *See* STITH & CABRANES, *supra* note 27, at 81–82 (noting the unique role of the judge in exercising "genuine judgment" at sentencing, which the federal sentencing guidelines threaten to undermine); AAS, *supra* note 7, at 35 ("Judges see their job [at sentencing] as . . . creating a balance between the *formal* and *substantive* vision of justice—between the 'tariff' and the individual case." (emphases in original)).

courts. Though the concerns are quite distinct from the issues raised in relation to earlier era population-based sentencing tools, we might expect that the courts' response to the dilemmas they present may share important continuities that are obscured by less holistic frames.[75] Parts II and III take up that task of illuminating those continuities.

II
TECHNIQUE #1: EXPANDING PROCEDURAL RIGHTS AT SENTENCING

This Part argues that courts respond to the push toward population-based sentencing by expanding individual procedural rights into the sentencing process where they once did not apply. While the U.S. Supreme Court expanded some rights to sentencing in response to the sentencing guidelines, state courts have not done so in the context of actuarial risk assessments because the tools do not prevent judges from passing moral judgment on individual defendants.

A. The Federal Sentencing Guidelines Jurisprudence

The U.S. Sentencing Commission developed the federal sentencing guidelines at the behest of congressional mandates. It produced a biaxial grid with 258 possible sentence ranges within which a judge could exercise its discretion.[76] That grid provided a range within which a judge would ordinarily sentence. The court calculates that range based upon myriad administrative rules and policies concerning abstract features of

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75 This Article focuses on what state courts are doing in response to actuarial risk assessments, which concerns engaging with procedural concerns that the tools raise at sentencing. Much scholarship considers equality-based concerns with the design of actuarial risk assessments and its implications for equity. *See supra* notes 5 & 20. This, too, should be analogized to the important case law and scholarship that developed around equality, the courts, and earlier population-based sentencing tools. For a seminal entry point to those topics, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1305 (1995) (compiling circuit court opinions on issues of race and the 100:1 ratio under the sentencing guidelines and mandatory minimum penalties). Alas, that topic could not be addressed in this Article, despite my many attempts to the contrary. Thanks to my dutiful mentors for making me see this. Future work will consider the topic, and I invite others to join me in that important endeavor.

76 *See* U.S. Sentencing Guidelines § 5.A (setting forth the sentencing grid in months of imprisonment). The commission designed the guidelines based on its analysis of 10,500 presentence reports. *See* U.S. SENT'G COMM'N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 21 (1987) [hereinafter COMM'N, SUPPLEMENTAL REPORT]. For more on the design of sentencing guidelines, see Eaglin, *Technologically Distorted*, *supra* note 8, at 512–13 (reflecting on the grid-like nature of most sentencing guidelines).

the crime and the offender (particularly his criminal history).[77] The tool was implemented in 1987.[78] Though much revised since that time, it remains in use.

This population-based sentencing tool transformed sentencing practice in fundamental ways. For example, the U.S. Sentencing Commission created quantifiable metrics that would convey crime severity at sentencing. These metrics, like the choice to measure drug offenses by drug weight, were deeply controversial and out of step with the courts' past practice.[79] Further, due to the guidelines' complexity and the way Congress implemented their use, a judge was recast as something more like "an accountant" who managed sentencing by finding facts that applied to the guidelines.[80] This was achieved in three ways. First, the Commission's complex guideline structure appeared to preclude many reasons for a judge to "depart," meaning sentence a defendant to a period of time that falls outside the mechanically calculated range proscribed by the guidelines.[81] Second, the federal appellate courts strictly enforced the Commission-proscribed sentencing guideline ranges against district court judges as a matter of choice.[82] Third, Congress passed legislation that increasingly aimed to reduce judges' ability to depart from the prescribed guideline ranges at sentencing.[83] Through its implementation,

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77 *See generally* U.S. Sentencing Guidelines (2018).

78 COMM'N, SUPPLEMENTAL REPORT, *supra* note 76, at 11.

79 *E.g.*, U.S. Sentencing Guidelines § 2.D1.1 (1987). While the commission used an empirical approach to replicate past practices with some offenses, they did not in the context of drugs where they adopted a weight-based approach and incorporated Congress's mandatory minimum penalty ratios. *Id.*; *see also* Kimbrough v. United States, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

80 STITH & CABRANES, *supra* note 27, at 82–85 (arguing that the tools eschewed a more traditional notion of judging whereby judges pass "moral judgment" on individual defendants for one where judges "process individuals according to a variety of purportedly objective criteria.").

81 Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1690-91 (1992) ("The new [federal] sentencing guidelines are more complex, inflexible, and severe than those devised by any other jurisdiction.").

82 *Id.* at 1683–84 (describing the federal sentencing guidelines as "mandatory guidelines" and emphasizing the "strict enforcement by courts of appeals hostile to departures" (internal quotation marks omitted)); Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 703–04 (2010) (emphasizing that courts chose to enforce the federal sentencing guidelines as though they were mandatory).

83 *E.g.*, PROTECT Act, Pub. L. No. 108–21, 117 Stat. 650 (2003) (amending the federal sentencing guidelines to constrain the courts' ability to depart from guideline-recommended sentencing ranges). 18 U.S.C. § 3553(b)(1) (2018) ren-

the federal sentencing guidelines became "advice" only in name. In practice, they left judges with very little room to sentence based on individual defendants. Under restrictive guidelines, judges engaged in something that looked a lot more like processing, and a lot less like sentencing.[84] In effect, judges were increasingly required to engage in population-based sentencing.

In response, the U.S. Supreme Court expanded the procedural rights of individual defendants at sentencing. For example, in *Burns v. United States*, the Supreme Court held that defendants are entitled to notice before a district court *sua sponte* departs upward from an applicable sentence range under the mandatory guidelines.[85] Such notice was not required prior to the federal sentencing guidelines, and it did not survive after the guidelines were rendered advisory.[86] Yet, in *Burns*, the majority opinion recognized that lack of such notice in a sentencing process so changed by the federal sentencing guidelines would raise serious, constitutional due process concern.[87]

More notably, the court expanded application of the Sixth Amendment jury trial right to jurisdictions with "mandatory" sentencing structures in the 2000s.[88] To understand the significance of this decision requires some legal background. In discretionary sentencing structures, the jury trial right traditionally did not apply. In *Apprendi v. New Jersey*, however, the

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dered the guidelines "mandatory." 18 U.S.C. § 3742(e) (2018) directed the appellate courts to review guideline departures under the searching de novo standard. These provisions made "Guidelines sentencing even more mandatory than it had been." *Booker*, 543 U.S. at 261.

84 Gertner, *supra* note 82, at 705.

85 Burns v. United States, 501 U.S. 129, 138-39 (1991) ("We hold that before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, [Federal Rule of Criminal Procedure] 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling.").

86 *See id.* at 133–34 (emphasizing procedural changes to the federal sentencing process created alongside the implementation of federal sentencing guidelines); Irizarry v. United States, 553 U.S. 708, 713 (2008) ("At the time of our decision in *Burns*, the Guidelines were mandatory; the Sentencing Reform Act of 1984 prohibited district courts from disregarding "the mechanical dictates of the Guidelines" except in narrowly defined circumstances. . . . Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice in *Burns*.").

87 *Burns*, 501 U.S. at 138; *see also* Irizarry, 553 U.S. at 713–14 (emphasizing that *Burns* exists in the context of mandatory guidelines).

88 For a definition of mandatory, see *supra* note 85.

U.S. Supreme Court applied the right to address concern about sentences that exceeded the legislatively proscribed, statutory range of sentence due to the court's application of the state's technical guidelines.[89] For example, when Charles Apprendi was charged and pled guilty to weapons possession charges, the statute permitted a sentence of up to ten years in prison.[90] The trial judge found an additional fact—that Mr. Apprendi intended to commit a hate crime—and enhanced the sentence guideline range accordingly.[91] The judge ultimately sentenced Mr. Apprendi to twelve years in prison—two years above the statutory maximum for the crime.[92] The *Apprendi* Court struck down the sentencing enhancement beyond the statutory range of conviction as "a tail which wags the dog of the substantive offense."[93] The holding rejected, as unconstitutional, the ability of the court to find facts that would produce a sentence that exceeded the statutory maximum for the charged offense.

Four years later, the court expanded application of the jury trial right to within-statute guideline ranges in Washington State and the federal system. In *Blakely v. Washington*, the U.S. Supreme Court applied the jury trial right to strike down Washington State's "presumptive" sentencing guideline system.[94] Under that system, Washington law set a "standard" range of punishment for most crimes.[95] A judge could sentence above that range if an "aggravating factor" was present.[96] The Washington statute provided an "illustrative rather than exhaustive" list of "grounds for departure" from the guidelines.[97] Though "judges were not limited to that list of factors nor were they obligated to increase a sentence based on a finding of one of the aggravating factors," the U.S. Supreme Court deemed the structure as mandatory.[98] As the Court explained, a judge could not issue a sentence without finding some additional fact.[99] Thus, it held that the sentencing range ensured by jury-found facts is effectively the "statutory maximum" in

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89 Apprendi v. New Jersey, 530 U.S. 466, 469–70 (2000).
90 *Id.*
91 *Id.*
92 *Id.* at 471.
93 *Id.* at 495 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).
94 542 U.S. 296, 301 (2004); *see also id.* at 317 (O'Connor, J., dissenting).
95 *Id.* at 303.
96 *Id.*
97 *Id.* at 305.
98 Hessick & Hessick, *supra* note 23, at 202; *see also Blakely*, 542 U.S. at 305.
99 *Blakely*, 542 U.S. at 305.

that mandatory sentencing structure. In *Booker*, a majority of the Court held that the federal guidelines, like the Washington State guidelines, violate due process and the Sixth Amendment.[100] In both cases, the U.S. Supreme Court extended the holding in *Apprendi* to mandatory guidelines operating within statutory sentencing ranges.[101]

These cases suggest that, to the courts, procedural rights and population-based sentencing are intimately linked. Where policymakers adopt a sentencing structure that directly constrains judicial sentencing power to fashion a sentence by passing moral judgment on the individual defendant, the courts expand individual procedural rights. To that end, the cases vindicate an important, but constructed, binary at sentencing: either judges retain sentencing discretion or defendants get more procedural rights in the face of population-based sentencing.[102] In some ways, this binary has existed since *Williams*, when the court rejected a confrontation clause challenge to out-of-court statements included in a presentence report.[103] Yet, the guidelines jurisprudence affirmed its salience in the context of population-based sentencing tools.[104] In the

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100 Washington State's guidelines operated in the same way as the federal sentencing guidelines. The only meaningful distinction between the structures concerned who developed the guidelines—a commission in the federal system, and the legislature in Washington State. Like the Washington State courts, a federal judge retained the power to depart from the sentencing guidelines. United States v. Booker, 543 U.S. 220, 226–27 (2005).

101 *Id.* at 244; *Blakely*, 542 U.S. at 301.

102 To the extent that judges play a more passive role in trials, one may think of this principle as suggesting that the expansion of procedural rights is likely to occur whenever sentencing takes on more characteristics of a trial. *See* STITH & CABRANES, *supra* note 27, at 81 (distinguishing the reactive role of judges throughout the adjudication process and the active role of judges in the post-conviction sentencing context). However, my aim is not to focus as much on the formalities of the process for *defendants*, but the kind of thinking such a process permits *judges* to engage in as the question that triggers expansion of individual procedural rights. *See infra* subpart II.B.

103 *See supra* note 27 and accompanying text.

104 For insight to the curious persistence of *Williams* in the guidelines-based era of sentencing reform, see Kyron Huigens, Solving the *Williams* Puzzle, 105 COLUM. L. REV. 1048, 1051 (2005) (recognizing that it seems "paradoxical to impose constitutional limits on sentencing that is governed by rules, while permitting sentencing that is not governed by rules to escape all constitutional constraint," and defending the distinction on the basis that adjudication focuses on rule of law while sentencing focuses on moral defensibility of our legal judgments.

There are various liberty interests at the intersection of the due process and jury trial right in the sentencing context implicated by offense-oriented population-based sentencing tools. This includes the pursuit of accurate fact finding, *Booker*, 543 U.S. at 287–88 (Stevens J., dissenting in part) (arguing that in many instances, engrafting the jury trial right would require the Government "simply

wake of *Booker*, the Court has repeatedly affirmed this binary in its sentencing jurisprudence.[105] Where the judge can sentence individual defendants, more procedural protections are not required. [106] The critical question turns on what kind of sentencing structure a jurisdiction maintains.[107]

[to] prove additional facts to a jury beyond a reasonable doubt"); *see also In re* Winship, 397 U.S. 358, 363–64 (1970) (upholding the reasonable-doubt standard as a due process right in part to reduce errors in factfinding); the allocation of sentencing power between the branches of government, *see* Blakely v. Washington, 542 U.S. 296, 305–06 (2004) ("[The jury trial right] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 63 (2003) ("The Constitution . . . places a judicial veto in the hands of the people because the danger of state abuse is especially high and the consequences are especially troubling [in criminal administration]. . . . Less commonly observed is the fact that the judiciary is comprised of both judges and juries and that this division also checks state abuse of power." (emphasis omitted)); and empowering local juries to apply and contest applications of the law, *see* Alleyne v. United States, 570 U.S. 99, 123 (2013) (Breyer, J., concurring in part) ("I cannot accept the dissent's characterization of the Sixth Amendment as simply seeking to prevent 'judicial overreaching' when sentencing facts are at issue. At the very least, the Amendment seeks to protect defendants against 'the wishes and opinions of the government' as well. And, that being so, it seems to me highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence." (citations omitted)); LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 3–4 (2015) (critiquing the elimination of "the local public" from the criminal justice process in the last thirty years and celebrating the jury trial right jurisprudence as vindication of that important public function).

105 After *Booker*, the central concern is whether the guidelines operate enough like law to require vindicating a procedural due process right at sentencing. For example, in *Irizarry v. United States*, the Court held that the advisory sentencing guidelines were not law-like enough for the due process right to notice. 553 U.S. 708, 713–15 (2008). In *Peugh v. United States*, the Court held that the guidelines were law-like enough for ex post facto right. 569 U.S. 530, 534–35 (2013). In *Beckles v. United States*, the Court held that the guidelines were not law-like enough to implicate the void for vagueness doctrine. 137 S. Ct. 886, 892 (2017).

106 This is, in itself, a quixotic question because sentencing structures exist on a spectrum rather than a finite binary between "mandatory" and "advisory." *See* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 157 (2005) (setting forth a ten-point spectrum of enforceability); Hessick & Hessick, *supra* note 23, at 195 (arguing that mandatory and discretionary sentencing structures are better understood as falling along a spectrum and urging application of procedural rights regardless of sentencing structure).

107 A line of the post-*Booker* jurisprudence considers whether, and what, additional procedural protections survive in an advisory guidelines system. The central concern is whether the guidelines operate enough like law to require vindicating a procedural due process right at sentencing. The Supreme Court's jurisprudence is inconsistent in on that front. For example, in *Irizarry v. United States*, the Court held that the advisory sentencing guidelines were not law-like enough for the due process right to notice. 553 U.S. 708, 713–15 (2008). In

B. Actuarial Risk Assessments in the State Sentencing Jurisprudence

To date, state courts have not expanded individual procedural rights in jurisdictions where courts use particular actuarial risk assessments at sentencing. This is likely because the tools have not been implemented in a way that fundamentally undermines the court's traditional ability to pass moral judgment on individual defendants at sentencing.

Defendants enjoy minimal procedural rights at sentencing, yet actuarial risk assessments exist in some tension with those rights. For example, actuarial risk assessments can undermine the defendant's due process right not to be sentenced based on irrational or irrelevant sentencing factors.[108] Predictive risk factors exist in tension with state sentencing laws. As an example, Indiana strictly regulates the consideration of acquitted behavior, yet actuarial tools may use such information in assessing risk.[109] Actuarial tools may also violate state laws requiring that "sentence decisions be neutral of a variety of status variables, including race, ethnicity, national origin, gender, and religion" and, in some instances, social status.[110] While some argue that *risk* may influence the sentence, but these individual sentencing factors cannot, there is some ambiguity on whether predictive risk factors and sentencing factors should be considered as the same thing.[111] Actuarial risk as-

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Peugh v. United States, the Court held that the guidelines were law-like enough for ex post facto right. 569 U.S. 530, 534–35 (2013). In *Beckles v. United States*, the Court held that the guidelines were not law-like enough to implicate the void for vagueness doctrine. 137 S. Ct. 886, 892 (2017).

108 *See* Buck v. Davis, 137 S. Ct. 759, 778 (2017); Zant v. Stephens, 462 U.S. 862, 885 (1983). Notably, the RAIs used in noncapital sentencing do not include race as a predictive risk factor.

109 Eaglin, *Constructing*, *supra* note 56, at 104.

110 Hamilton, *supra* note 55, at 274 n.320 (citing statutes from Arkansas, Florida, Massachusetts, Michigan, Nevada, Ohio, and Tennessee prohibiting consideration of race, gender, and economic status at sentencing). For example, Ohio and Tennessee prohibit gender as an influencing factor at sentencing. *See* OHIO REV. CODE ANN. § 2929.11(c) (West 2020) ("A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender."); TENN. CODE ANN. § 40-35-102(4) (2020) ("Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual. . . ."). For an analogous argument in relation to federal statute should an actuarial risk assessment be adopted in the federal sentencing process, see Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 693–701 (2015) (raising the statutory limitation issue, but providing "another, independently-sufficient basis for prohibiting" these factors in risk assessments in the U.S. Constitution).

111 *See Buck*, 137 S. Ct. at 775 ("It would be patently unconstitutional for a state to argue that the defendant is liable to be a future danger because of his race); Goel et al., *supra* note 3 (suggesting that "*Buck* appears to be a case about

sessments can also undermine the defendant's due process right to be sentenced based on accurate information.[112] One way to interpret that right concerns the level of technical accuracy in the tools' design, which varies.[113] Another concerns the lack of transparency in the tools, particularly the proprietary tools whose algorithms are often unavailable for inspection.[114]

RAI advocates tend to encourage courts to expand individual procedural rights to cope with these concerns at sentencing. For example, Professor Brandon Garrett and Dr. John

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race, not about all immutable traits or risk more generally"); *see generally* Jessica M. Eaglin, *Predictive Analytics' Punishment Mismatch*, 14 I/S 87, 98–99 (2017) (summarizing the emerging divide in scholarship on the predictive risk factors versus sentencing factors issue).

112 In the capital context, the U.S. Supreme Court has recognized a right to test the accuracy of information. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (emphasizing that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause" and rejecting the state's effort to "permit[ ] a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel"). In the noncapital context, the Court has recognized a similar principle. *See* Townsend v. Burke, 334 U.S. 736, 740–41 (1948) ("[O]n this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.").

113 This issue turns on the question of how to measure accuracy, and whether any of that matters in comparison to clinical, meaning unstructured, judgments of risk made by human actors. I have toed into this discourse before, and will not do so here. *See* Eaglin, *Constructing*, *supra* note 56, at 89–94. Suffice it to say, the existing jurisprudence around predictions and criminal sentencing is extremely permissive. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding the Texas death penalty law that directs juries to determine whether to impose the death penalty on a particular defendant in part based on predictions of a defendant's future behavior); Barefoot v. Estelle, 463 U.S. 880, 904 (1983) (upholding the Texas statute by establishing a very low bar for constitutionality of predictions generally). For a recent and accessible overview of the accuracy-related issues raised by actuarial risk assessments, see MELISSA HAMILTON, RISK ASSESSMENT TOOLS IN THE CRIMINAL LEGAL SYSTEM—THEORY AND PRACTICE 24–58 (2020) (describing the science underlying algorithmic risk tools).

114 For example, equivant, the commercial developer of the Northpointe COMPAS assessment, refuses to release the formula used to predict recidivism risk in the tool as a trade secret. *See Loomis*, 881 N.W.2d at 761 ("Northpointe, Inc., the developer of COMPAS, considers COMPAS a proprietary instrument and a trade secret."); *Risk Scores: The Not-So-Secret Recipe*, EQUIVANT (Aug. 14, 2020), https://www.equivant.com/risk-scores-the-not-so-secret-recipe/ [https://perma.cc/5ZW3-ZXBL], (noting that "raw score[s are] calculated based on the formulas in the software"). For a critique of proprietary claims in criminal administration, see Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1376 (2018) (warning of trade secret concerns with RAIs at sentencing). For a recent claim that such proprietary tools should violate an individual defendant's due process rights at sentencing, see Brenner et al., *supra* note 3, at 279–82 (2020) (discussing why "the Due Process Clause and other policy justifications do require courts to give expanded opportunities for defendants to challenge the validity of a risk assessment" at sentencing).

Monahan suggest "the Due Process and Equal Protection Clauses demand additional assurances of consistency and reliability beyond the minimal requirement that some individual decision-maker theoretically consider the relevant criteria and state some reason for a decision [at sentencing]."[115] As one notable example, enthusiasm is growing for courts to recognize some of the same procedural rights that have been urged in the face of automated government decision making systems from the civil, mostly welfare context. Professors Danielle Citron and Frank Pasquale say courts should recognize enhanced due process rights to "inspect, correct, or dispute" automated government decision making tools.[116] Recently, data governance policymakers have urged courts to adopt this meaning of the right to be sentenced based on accurate information at sentencing.[117] In a recent article on this point, several scholars called for this kind of due process right at sentencing by analogizing between the right to inspect a presentence report and the right to inspect an actuarial risk assessment.[118] If one can inspect a presentence report, they suggest, one should be able to inspect the RAI score embedded within the presentence report to make sure it is accurate.[119] Thus, these scholars and advocates seek to expand procedural rights at sentencing by

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115 Garrett & Monahan, *supra* note 70, at 484. Though the authors focus their critique on the trend in the bail context, they discuss the expansion of actuarial risk assessments in both the pretrial and postconviction context, and so appear to apply the concern equally to both contexts.

116 *See* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 18–20 (2014) (encouraging enhanced due process standards for individuals subject to adjudications with automated predictions).

117 *See* Danielle Citron, *(Un)fairness of Risk Scores in Criminal Sentencing*, FORBES (July 13, 2016, 3:26 PM), https://www.forbes.com/sites/daniellecitron/2016/07/13/unfairness-of-risk-scores-in-criminal-sentencing/#309a91754ad2 [https://perma.cc/278X-N72U] (commending the *Loomis* court for addressing risk assessments, but critiquing its approach based on automation bias); see also DANIELLE L. KEHL, PRISCILLA GUO & SAMUEL KESSLER, ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS AT SENTENCING 22–23 (2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33746041 [https://perma.cc/9D7P-HTLD] (noting that "there is a plausible distinction between being able to review and rebut the individual pieces of information that are fed into the algorithm and being able to actual[ly] review how the score itself was calculated," but not necessarily urging a due process right to review).

118 Brenner et al., *supra* note 3, at 280–81.

119 *See id.* at 281 ("Because information considered by predictive algorithmic tools is similar, if not identical, to that in federal sentencing reports, state and federal courts should fashion procedural rules similar to the federal rules to allow defendants to challenge the accuracy of algorithmic risk assessments."); *see also id.* at 282–83 (applying this argument to the *Loomis* decision).

changing the meaning of an existing right to accommodate the new realities of government decision making.

The courts, for the most part, have rejected these procedural challenges when defendants appeal from sentences where courts considered an RAI in the sentencing process.[120] For example, in *State v. Loomis*, the Wisconsin Supreme Court considered due process challenges to Eric Loomis's sentence.[121] The sentencing court considered risk scores included in the presentence report provided to the court. The scores were the product of a proprietary tool, the Correctional Offender Management Profile for Alternative Sanctions (COMPAS), adopted by the Wisconsin Department of Corrections for statewide use.[122] Mr. Loomis asserted that the tool produced inaccurate information that he could not assess without information about how the factors were weighed.[123] The court, drawing on the presentence report analogy, rejected the claim.[124] It suggested that defendants receive information about the risk score in advance of the sentencing hearing, and so no additional information is required to satisfy constitutional due process concerns.[125]

Juxtaposing this case against recent scholarly critiques illuminates the value of the population-based sentencing frame. If what courts are supposed to do at sentencing has fundamentally mutated to the point where judges engage in population-based sentencing, as unfortunately the trend has been in the welfare context, then perhaps procedures should change.[126] Yet, if what judges still do at sentencing is pass

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120 *But see, e.g.*, State v. Guise, 919 N.W.2d 635, *4 (Iowa App. Ct. 2018) (overturning a sentence because the sentencing judge relied on an actuarial risk assessment that lacked transparency) (sentence reinstated in State v. Guise, 921 N.W.2d 26, 29 (Iowa 2018)).

121 Eric Loomis pled guilty to fleeing a police officer and operating a car without the owner's consent. 881 N.W.2d 749, 754 (Wis. 2016). The trial court imposed the maximum sentence available under the statute. *Id.* at 756.

122 *See* ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, STATE JUDICIAL BRANCH LEADERSHIP IN SENTENCING AND CORRECTIONS REFORMS 1, 6 (2013), https://www.ncsc.org/__data/assets/pdf_file/0018/26217/state-judicial-branch-leadership-brief-csi.pdf [https://perma.cc/EMS4-Z883]. The Department of Corrections is responsible for preparing the presentence reports in Wisconsin. WIS. STAT. § 972.15 (2020).

123 *Loomis*, 881 N.W.2d. at 757.

124 *Id.* at 761.

125 *Id.* (suggesting that the presentence report analogy is imperfect).

126 *But see, e.g.*, Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1722 (2019) (book review) (critiquing the trend in focus on technological fixes that aim to eliminate biases from algorithms and emphasizing that "[s]ome government decisions simply should not be automated at all because automation itself makes adjudication undemocratic.").

moral judgment on individual defendants, then the procedures do not need to change. The traditional sentencing process expects individual judges to make informed decisions about individual defendants at sentencing using all the information available to them. Within the framework of population-based sentencing, it becomes clear that we are asking the wrong question of the courts. The matter is not whether judges can consider a tool that lacks transparency or includes controversial, but not prohibited, predictive factors at sentencing.[127] Rather, the matter is whether the conditions around sentencing have changed so much that courts must engage in population-based sentencing and procedural rights, once unnecessary at sentencing, are now required.

While Congress, the U.S. Commission, and the federal appellate courts made it very clear that the sociological conditions of sentencing had changed in the context of the federal guidelines, it is not so clear now in the context of actuarial risk assessments at sentencing. What is clear from the state courts' sentencing jurisprudence, however, is that this is the exact question that the courts want to know. Two examples make the point.

First, Virginia incorporates RAIs into the sentencing process through its advisory guidelines.[128] These guidelines are, and have always been, "flexible guideposts" to which judges voluntarily adhere at sentencing.[129] Judges can depart from

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127 Brenner et al., *supra* note 3, at 279 ("The question is whether this 'black box' methodology violates the due process rights of criminal defendants by denying them the opportunity to challenge their output risk scores, or the means by which those scores were calculated."). Whether judges can do this is distinct from the normative question of whether they should. *See Criminal Law—Sentencing Guidelines—Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing—*State v. Loomis, *881 N.W.2d 749 (Wis. 2016)*, 130 HARV. L. REV. 1530, 1537 (2017) ("The *Loomis* opinion, then, failed to answer why, given the risks, courts should still use such assessments.").

128 There, the Virginia Sentencing Commission developed an actuarial risk assessment to identify "25 percent of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions" in the state. Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT'G REP. 165, 165 (2004). The sentencing commission incorporated its Nonviolent Risk Assessment instrument into the sentencing guidelines in 2002. Garrett & Monahan, *supra* note 70, at 461 (noting that the tool includes the following risk factors: age, gender, prior adult felony convictions, prior adult incarcerations, prior juvenile adjudications, and prior arrest in the last twelve months). Soon thereafter, it introduced two other actuarial risk assessments for sex offenders into the state's sentencing guidelines. Kern & Farrar-Owens, *supra* note 128, at 166–67.

129 *See* Luttrell v. Commonwealth, 592 S.E.2d 752, 755 (Va. Ct. App. 2004). Richard Kern, *Sentence Reform in Virginia*, 8 FED. SENT'G REP. 84, 84 (1995)

the guideline range for any reason at all. The actuarial risk assessments can shape the recommendations within the guidelines, but the guidelines themselves have never been enforceable through appellate review.[130] A judge need not explain why she did or did not adhere to the recommendations.[131] Consistent with that structural reality, the Virginia state courts virtually eliminated constitutional challenges to the use of actuarial risk assessments at sentencing through two appellate cases decided in 2004. The first, *Brooks v. Commonwealth*,[132] is an unpublished decision. There, defendant Christopher Brooks raised due process and equal protection challenges to the trial court's consideration of the actuarial risk information as part of the sentencing guidelines recommendation.[133] The appellate court dismissed these challenges on the basis that the Virginia sentencing guidelines are nonbinding. So long as the sentence falls within the statutory limits set by the legislature, appellate courts will not review it.[134] A second case, *Luttrell v. Commonwealth*,[135] results in a similar published holding. There, the Virginia Court of Appeals considered defendant Brian Luttrell's argument that the state's Sex Offender Risk Assessment Instrument was "unreliable in predicting recidivism."[136] The appellate court dismissed this challenge, explaining that failure to correctly apply the guidelines is unreviewable on appeal.[137] Thus, both *Luttrell* and *Brooks* have precluded constitutional challenge to RAIs at sentencing in Virginia courts.

More recent state cases echo this approach to procedural challenges at sentencing. As an example, consider Michigan. That state maintains advisory sentence guidelines based on the offense and the offender's criminal history.[138] Though the

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(noting that the guidelines were "voluntary," meaning "judges could depart without specifying a rationale and there was no appellate review").

130 *Id.*

131 *Id.*

132 No. 2540–02–3, 2004 WL 136090 (Va. Ct. App. Jan. 28, 2004).

133 *Id.* at *1.

134 *Id.*

135 592 S.E.2d 752 (Va. Ct. App. 2004).

136 *Id.* at 755. The heart of Mr. Luttrell's challenge related to whether the court could apply old or new guidelines since the sentencing commission increased the threshold for increases in the guideline range.

137 *Id.*

138 *See* MICHIGAN JUDICIAL INSTITUTE, SENTENCING GUIDELINES MANUAL 5 (2020), *available at* https://mjieducation.mi.gov/documents/sgm-files/94-sgm/file [https://perma.cc/KVR5-RSUC] (even though the state sentencing guidelines are now advisory rather than binding, "sentencing courts are still required to determine the applicable guideline range and take it into account when imposing a

guidelines are no longer binding, sentencing courts must determine the applicable guideline range and take it into account when imposing a sentence.[139] Since 2014, Michigan Department of Corrections officials have incorporated the COMPAS Risk/Needs Assessment into the presentence report provided to state judges.[140] In 2019, the Michigan Court of Appeals issued an unpublished opinion concerning four consolidated cases where the sentencing judges considered presentence reports that included the proprietary actuarial risk assessment scores.[141] The defendants asserted that lower courts violated their due process rights by considering the COMPAS tool that analyzes general population data, uses input factors that discriminatorily impact race and gender, and lacks transparency.[142] In rejecting the challenges and affirming the sentences, the court emphasized upfront: "A sentencing court is not bound by the recommendations included in a [presentence report], including the recommended range for a minimum sentence under the sentencing guidelines."[143] Further, it rejected the defendants' claim that "inclusion of COMPAS information unfairly influences or replaces a sentencing court's individual sentencing discretion" by analogizing between the tools' recommendation and a probation officer's report.[144]

These holdings illustrate appellate courts looking to sentencing structure to understand if RAIs actually reduce the court's ability to pass moral judgment on individual defendants at sentencing. Without indications of such, the courts are not willing to overturn the trial court's sentence determination. They are not willing to expand procedural rights at sentencing either. This illuminates a key point about population-based sentencing. As with the guidelines, the presence of an actuarial risk assessment alone is not enough to convince the courts

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sentence."); People v. Lockridge, 870 N.W.2d 502, 506 (Mich. 2015) (rendering the previously-mandatory state sentencing guidelines advisory by applying the U.S. Supreme Court's Sixth Amendment jurisprudence).

139 MICHIGAN JUDICIAL INSTITUTE, *supra* note 138, at 5.

140 *See* Michigan Department of Corrections, Administration and Use of COMPAS in the Presentence Investigation Report 22 (2017), *available at* https://www.michbar.org/file/news/releases/archives17/COMPAS-at-PSI-Manual-2-27-17-Combined.pdf [https://perma.cc/7LR4-NLFF].

141 People v. Younglove, No. 341901, 2019 WL 846117, at *1 (Mich. App. Feb. 21, 2019). Defendants challenged the sentences on the basis that COMPAS analyzes general population data, uses input factors that discriminatorily impact race and gender, and lacks transparency. *Id.*

142 *Id.* at *2.

143 *Younglove*, 2019 WL 846117, at *3.

144 *Id.*

that the nature of sentencing has fundamentally changed. Courts care about that bigger picture. At sentencing, the sociological context around the nature of judging is critically important to determining whether and how procedural rights may expand.

III
TECHNIQUE #2: CREATING PROCEDURAL RULES AT SENTENCING

This Part argues that courts respond to the push toward population-based sentencing by creating procedural rules that preserve a judge's ability to pass moral judgment on an individual defendant. The U.S. Supreme Court created light, and then more substantive, procedural rules to preserve the ability for federal judges to pass moral judgment on individual defendants under the federal sentencing guidelines. Some state courts are creating light procedural rules to preserve judicial power to pass moral judgment in the face of actuarial risk assessments' expansion at sentencing. Others would preserve that power without creating new rules.

A. The Federal Sentencing Guidelines Jurisprudence

The U.S. Supreme Court created light procedural rules and, as the guidelines were enforced more strictly against district court judges, heftier rules.[145] These rules created a space for judges to continue passing moral judgment on individual defendants at sentencing.

For an example of a lighter procedural rule, consider *Koon v. United States*.[146] There, the Supreme Court established a procedural rule that appellate courts review a sentencing judge's decision to depart from guideline recommended sentence ranges under a deferential, abuse of discretion stan-

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145 The creation of procedural rules in constitutional criminal procedure resonates of a substantive due process analysis, but it is distinct. Substantive due process analysis balances the liberty-enhancing potential of a right against the government interest in an efficient sentencing process. *See, e.g.*, Burns v. United States, 501 U.S. 129, 148–56 (Souter, J., dissenting) (applying the *Mathews v. Eldridge* test to due process right to notice concern under the mandatory guidelines). Courts tend to adopt a "balancing-of-interests" approach when creating criminal procedure rules, which occurs "at a higher level" compared to the balancing conducted at the level of individual cases. Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 737 (2000). For a rich description of the "balancing-of-interests" approach to constitutional criminal procedure, *see id.* at 794–98.

146 518 U.S. 81 (1996).

dard.[147] In reaching this holding, the court emphasized how this population-based sentencing tool changed the nature of sentencing. As Justice Paul Stevens explained for the Court, "the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system [of sentencing]."[148] At the same time, judging exists in some tension with those aims. As the Court explained: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[149] The procedural rule ameliorates that tension.[150] In other words, it affirmed the ability for judges to pass moral judgment on individual defendants in the face of population-based sentencing.

The more substantive procedural rule comes from *Booker*, decided two years after Congress passed legislation to make the federal guidelines "more mandatory."[151] Though a majority of the Court held that the federal sentencing guidelines violated an individual's due process and jury trial right,[152] the Court went further by creating a procedural fix. The *Booker* remedial decision identified two ways to cure the due process defect that the sentencing guidelines created.[153] One route, offered by the remedial minority of the Court, was to apply the jury trial right to the federal sentencing guidelines. That route, as explained by Justice Stevens, would require a jury to find the facts that trigger a sentence enhancement above the effective sentence range proscribed by facts found beyond a reasonable doubt by jurors at trial.[154] For example, defendant Freddie Booker was convicted of possession to distribute at least fifty grams of crack cocaine, leading to conviction under a statute that carries a minimum sentence of ten years in prison and a maxi-

147 *Id*. at 91 ("The appellate court should not review the departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion.").

148 *Id*. at 113.

149 *Id*.

150 *Id*. ("We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review that we adopt.").

151 *See supra* note 83.

152 *See supra* notes 100–01.

153 *See Booker*, 543 U.S. at 246 (summarizing the dual approaches to remedying the jury trial right problem in federal sentencing guidelines).

154 *Id.*at 273 (Stevens, J., dissenting in part).

mum of life imprisonment.[155] The jury, at trial, heard evidence that the defendant possessed 92.5 grams of crack cocaine.[156] Based on *Booker*'s criminal history and the amount of drugs found by the jury, the sentencing guidelines prescribed the judge to sentence Mr. Booker to a range between 210 and 262 months in prison.[157] At the sentencing hearing, however, the judge found by a preponderance of the evidence that Mr. Booker actually possessed 658.5 grams of crack cocaine; this finding led to a guideline-prescribed sentence range between 360 months to life.[158] The guideline-prescribed minimum, while within the statutory range set out by the legislature, increased the defendant's expected sentence range by more than 100 months.[159] Justice Stevens's solution to the jury trial right problem would require the jury to make the finding of fact about the amount of drugs possessed by the defendant beyond a reasonable doubt.[160] This approach would collapse the jury trial right into a population-based sentencing regime.

The other route, adopted by the remedial majority of the Court, created the space for judges to continue passing moral judgment on individual defendants at sentencing. All of the Justices agreed that an advisory sentencing guideline structure, where judges retained discretion to sentence as they saw fit with reference to guidelines but independent from their diktats, could evade Sixth Amendment scrutiny. Justice Stevens conceded as much in his defect majority opinion. He explained:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by [this case] would have been avoided entirely if Congress had omitted from the [federal Sentencing Reform Act] the provisions that make the Guidelines binding on district judges . . . . For when a trial judge

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155 *Id.* at 227.

156 *Id.*

157 *Id.*

158 The trial judge found that Mr. Booker possessed 566 grams of crack in addition to the 92.5 grams found by the jury at trial. *Id.* at 235, 257.

159 *Id.* at 235.

160 *Id.* at 273 (Stevens, J., dissenting in part); *see also* Cunningham v. California, 549 U.S. 270, 286 (2007) (summarizing the options before the Supreme Court when faced with the jury trial right problem in *Booker*).

> exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.[161]

In this regime, judges retained broad discretion free of technical guidelines.

The *Booker* remedial majority took the latter option.[162] In an opinion authored by Justice Stephen Breyer, the U.S. Supreme Court created a new procedural rule at sentencing: the guidelines were "effectively advisory."[163] It excised two statutory provisions that made the guidelines system mandatory in nature. The first provision, 18 U.S.C. § 3553(b)(1), prevented a district court judge from departing from the mechanical dictates of the guidelines unless it made findings of an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission.[164] The second provision, section 3742(e), enhanced the appellate courts' enforcement of sentences outside the guidelines.[165] Because the guidelines recommended, but no longer required, a judge to sentence a defendant above the effective statutory range set by guidelines and based on the finding of particular facts, it evaded the constitutional concern.[166]

This decision created the space for individual judges to continue the traditional process of passing moral judgment on individual defendants at sentencing. The ensuing federal sentencing jurisprudence made this point abundantly clear. For example, consider *Kimbrough v United States*.[167] There, the Court upheld a district court judge's decision not to sentence a defendant convicted of trafficking in crack cocaine within the proscribed guideline range.[168] Under the federal sentencing guidelines, defendant Derrick Kimbrough should have received a sentence between 19 to 22.5 years in prison.[169] The district court decided to "override" the guideline recommendation and

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161 *Booker*, 543 U.S. at 233 (citations omitted).

162 This determination rested largely on the Court's recognition that sentencing guidelines achieved the government's interest in order—through the pursuit of an efficient, uniform, and systemically managed sentencing structure. *Id.* at 250–58 (emphasizing the need for uniformity in sentencing, for managing prosecutorial discretion, and for basing punishment on the "real conduct that underlies the crime of conviction" (emphasis omitted)).

163 *Booker*, 543 U.S. at 245.

164 18 U.S.C. § 3553(b)(1) (2018).

165 18 U.S.C. § 3742(e).

166 *Booker*, 543 U.S. at 233.

167 552 U.S. 85 (2007).

168 *Id.* at 112.

169 *Id.* at 92.

sentence Mr. Kimbrough to the fifteen-year mandatory minimum penalty required in the case.[170] The district court based its decision in part on a policy disagreement with the U.S. Sentencing Commission's decision to incorporate the mandatory minimum drug penalty structure into the otherwise empirically-informed guidelines.[171] In affirming the district court's sentence, the U.S. Supreme Court explained the sociological reasons why these drug guidelines are worthy of disagreement as a policy matter. It emphasized the racial disparities that the drug guidelines are perceived to create,[172] the contested origin of the mandatory minimum penalty,[173] and the ongoing policy debate about the legitimacy of these guidelines, specifically.[174] These critiques of the guidelines bolstered the court's affirmation of the district court's "institutional strength" in judging an individual defendant at sentencing.[175]

As another example, the Court that same day affirmed a sentence outside the proscribed guideline range for defendant Brian Gall.[176] Mr. Gall voluntarily exited a drug distribution conspiracy ring three years before federal prosecutors charged him with drug trafficking in methamphetamine.[177] At sentencing, the Iowa district court refused to sentence Mr. Gall to time in prison, contrary to the guideline recommendation.[178] It suggested that a sentence to probation rather than prison would do more to advance Mr. Gall's "self-rehabilitat[ion]."[179] In *Gall v. United States*, the U.S. Supreme Court affirmed the district court's sentence, holding that it was not outside the realm of a reasonable sentence even if it contradicted the guideline calcu-

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170 *Id*. at 93.

171 *Id*.

172 *See id*. at 98 (highlighting the U.S. Sentencing commission's conclusion that "the crack/powder sentencing differential fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race" and noting the racial disparities in defendants convicted of federal crack cocaine offenses).

173 *See id*. at 94–97 (describing the distinction between crack and power cocaine, the crack/powder disparity in the Anti-Drug Abuse Act of 1986, and the Commission's decision to collapse the weight-driven scheme into the guideline structure).

174 *See id*. at 97–100 (describing the U.S. Sentencing Commission's effort to reform the crack/powder sentencing guidelines).

175 *Id*. at 109.

176 Mr. Gall was sentenced to 36 months of probation, compared to the sentence range of 30-37 months imprisonment prescribed by the federal sentencing guidelines. *See* Gall v. United States, 552 U.S. 38, 43 (2007).

177 *Gall*, 552 U.S. at 41.

178 *Id*.

179 *Id*.

lation.[180] In *Gall*, like in *Kimbrough*, the court emphasized sociological realities about punishment in society. In both cases, these critiques were launched to affirm *Booker's* rule that the federal sentencing guidelines are advisory.[181]

These cases affirmed the power of judges to pass moral judgment on individual defendants in social context, rather than sentencing in the abstract. The cases vindicated a particular kind of penal knowledge grounded in understanding the individual and society. While legislatures and the federal sentencing commission pushed courts toward population-based sentencing, the court defended lower courts' ability to think about "every convicted person as an individual and every case as a unique study in human failing."[182] It achieved this through creation of procedural rules.

B. Actuarial Risk Assessments in the State Sentencing Jurisprudence

In response to procedural challenges to sentences where courts considered actuarial risk assessments at sentencing, some state courts are creating light procedural rules to preserve the space for judges to continue passing moral judgment on individual defendants at sentencing. Other states courts would preserve that space without creating new procedural rules.

For an example of a state court creating procedural rules to preserve the space for judges to pass moral judgment on individual defendants rather than engage in population-based sentencing, consider *State v. Loomis*. Mr. Loomis challenged his sentence on three grounds related to the sentencing court's reference to a proprietary RAI scores that characterized the defendant as high risk.[183] First, Mr. Loomis asserted that the tool produced inaccurate information that he could not assess

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180 *Id*. at 59–60.

181 Judges must still reference the federal sentencing guidelines as a starting point in their sentencing process, even if a judge can issue a sentence that disagrees with the guideline range suggested by the Sentencing Commission on policy grounds. *E.g.*, Gall v. United States, 552 U.S. 38 (2007).

182 *Koon*, 518 U.S. at 113; *see also Kimbrough*, 552 U.S. at 109 (emphasizing the "institutional strengths" of the sentencing judge); *Gall*, 552 U.S. at 51–52 (emphasizing the "institutional advantage" of district courts at sentencing).

183 *See Loomis*, 881 N.W.2d at 755 (noting that the COMPAS risk scores considered by the court at sentencing characterized Mr. Loomis as "high risk of violence, high risk of recidivism, [and] high pre-trial risk").

without information about how the factors were weighed.[184] Second, Loomis asserted that the tool violated his due process right to an individualized sentence.[185] Finally, Mr. Loomis argued that the court violated his due process rights by considering COMPAS-produced information because the tool relies on gender as a factor to determine risk level.[186]

The Wisconsin Supreme Court rejected each of these claims,[187] but created procedural rules in the state to preserve the space for judges not to engage in population-based sentencing. Building upon a notable ruling on RAIs at sentencing from Indiana in 2010,[188] *Loomis* prohibits lower courts from using an RAI to determine the severity of the sentence.[189] It adds another dimension through an additional constraint: judges cannot use RAIs as "the determinative factor in deciding whether an offender can be supervised safely and effectively in the community."[190]

The Wisconsin Supreme Court goes further by issuing several warnings *to sentencing judges* that must attach to every presentence report that includes a COMPAS risk assessment in the state.[191] These warnings concern: (1) the tool's proprietary nature; (2) the tool's reliance on group data versus individualized information; (3) the concern that tools disproportionately classify minority defendants as higher risk; (4) the variation in validation studies; and (5) the fact that COMPAS was developed to assist the Department of Corrections in the post-sentencing context.[192] The warnings are a corollary to the procedural rules declared by the court.[193] In addition, the court called on the judiciary to constantly monitor the tools, leaving space for potentially different notifications attached to different types of risk tools used now or developed in the future.[194]

These procedural rules aim to preserve the space for judges to sentence individual defendants in social context rather than

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184 *Id.* at 757. The Wisconsin Supreme Court previously stated outright that defendants have a "constitutionally protected due process right to be sentenced upon accurate information." State v. Travis, 832 N.W.2d 491, 496 (Wis. 2013).

185 *Loomis*, 881 N.W.2d at 757.

186 *Id.*

187 *Id.* at 765.

188 *Id.* (citing Malenchik v. State, 928 N.E.2d 564, 574 (Ind. 2010)).

189 *Loomis*, 881 N.W.2d at 768–69.

190 *Id.* at 768.

191 *Id.* at 769 ("[T]his written advisement should inform sentencing courts of the following cautions as discussed throughout this opinion . . . .").

192 *Id.*

193 *Id.* at 769–70.

194 *Id.* at 753, 770.

engage in population-based sentencing. Though indirectly stated, this sentiment is best expressed in two passages from the *Loomis* decision. First, the majority opinion suggests that judges, like correctional officers, may effectively "override the computed risk as appropriate" in line with the COMPAS user manual.[195] Chief Justice Patience Roggensack more squarely takes on the task of characterizing judicial sentencing power as akin to passing moral judgment on an individual defendant. She concurs in the majority opinion to emphasize that the circuit court appropriately considered numerous sentencing factors, as underscored by the majority opinion.[196] She adds, however, that courts should only "consider" COMPAS rather than "rely" on RAIs at sentencing because this would contravene the defendant's right to due process.[197] In making a distinction between these two terms, the Chief Justice appears to be emphasizing a notion of judging that is distinct from population-based sentencing. It requires something more like taking multiple factors into consideration in social context, and less like processing a person in the abstract based on predetermined factors and analysis.

In a more recent case, the Iowa court of appeals grappled with whether to adopt the procedural rules declared in Wisconsin in its own state. In *State v. Guise*, Defendant Montez Guise appealed from a sentence to incarceration because the sentencing court referenced an actuarial risk assessment without the same warnings issued in *Loomis*.[198] The appellate court overturned the sentence as an abuse of discretion because the actuarial risk assessment lacked transparency.[199] While the Iowa Supreme Court reversed, holding that Mr. Guise failed to properly raise the appeal below,[200] the dissenting opinions from the appellate court illuminate how those appellate court judges would adhere to the same approach as *Loomis*, without creating new procedural rules.

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195 *Id*. at 764.
196 *Id*. at 773 (Roggensack, C.J., concurring).
197 *Id*. at 774.
198 State v. Guise, 919 N.W.2d 635 (Iowa App. Ct. 2018).
199 *Id*. at *4 ("The [Iowa Revised Risk assessment] as described in Guise's [presentence] report was a black box, devoid of transparency. . . . We vacate the sentence and remand for resentencing without consideration of the [risk assessment] on this state of the record.").
200 State v. Guise, 921 N.W.2d 26, 29 (Iowa 2018).

The dissents authored by Judge Christopher McDonald[201] and Judge Michael Mullins make the point. In Judge McDonald's dissent, he suggests that "[d]ue process does not restrict district courts from considering risk assessment information."[202] This holding, he explains, would be in line with *Loomis*, which does not prohibit courts to consider the tools at sentencing.[203] Moreover, Iowa sentencing practice and procedure already makes it "impermissible for the district court to use any single consideration as a determinative factor in sentencing."[204] Further, he rejects the claim considering the tools would be an abuse of discretion in the state because it is relevant.[205] Moreover, the tools themselves are not "sui generis and wholly beyond the comprehension of sentencing judges."[206] In a separate dissenting opinion, Judge Mullins points to the heart of the matter when he reflects on the nature of sentencing.[207] As he explains, an actuarial risk assessment is relevant and important in the state's particular sentencing structure.[208] Yet, it is in the nature of judging to "weigh[ ] the importance of relevant information and determin[e] what is most important in guiding or justifying a particular decision."[209] Though he does not use the words, his decision suggests that the key to sentencing turns on considering various factors related to each individual defendant.[210]

These cases illuminate two state courts grappling with the trend toward population-based sentencing and whether it requires new procedural rules to preserve the space for judges to pass moral judgment at sentencing. In *Loomis*, the Wisconsin Supreme Court said yes. In *Guise*, the dissenting appellate court judges said no. Yet, in both instances, the opinions demonstrate judges questioning whether the nature of sentencing has changed such that the courts are no longer able to pass judgment on individual defendants at sentencing. They

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201 Judge McDonald has since been appointed to the state supreme court. I refer to him by Judge rather than Justice to be consistent with his role at the time the decision was issued.

202 *Guise*, 919 N.W.2d at *7 (McDonald, JJ, dissenting).

203 *Id*.

204 *Id*. at *11.

205 *Id*. at *12.

206 *Id*. at *9.

207 *Id*. at *21–*22 (Mullins, JJ, dissenting) (noting that integrated features of Iowa's sentencing structure between probation and incarceration).

208 *Id*. at *20–*21

209 *Id*. at *21.

210 *See id*. at *21 ("I have long held the view that the sentencing process can be effectively understood as having three components: requirements, prohibitions, and discretion.").

want to know whether a line has been crossed for judges in the realm of population-based sentencing.

IV
MAKING SENSE OF THE TENSION

There is a deep tension between the courts' techniques and the academic and policy-driven trend toward population-based sentencing. This Part explains the tension. It then identifies the peril and obscured promise this tension presents.

The academic and policy-driven push to make sentencing an abstract endeavor based on population-based representations of crime and offenders exists in cross-purpose with the entire design of the sentencing process. While the sentencing process is designed for individual judges to pass moral judgment upon individual defendants, population-based sentencing concerns the individuation of sentencing outcomes based on abstract representations of crimes and offenders.[211] While the language of sentencing remains the same, the institutional actors involved in sentencing remain the same, and the formalities of the process for judge and defendant remain largely the same, the social and historical context of sentencing is changed. To that end, academics and policymakers push to make the courts accommodate this trend toward population-based sentencing by changing their role at sentencing, too. Rather than judge (or, for the moment, in addition to judging) at sentencing, scholars increasingly encourage the courts to

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[211] *See supra* notes 42 and accompanying text. Note, on this point, that I have not grounded my analysis on the right to be sentenced as an individual. I have done this for three reasons. First, the courts have not engaged with the trend toward population-based sentencing through the principle of individualized sentencing. *See supra* subpart II.A; subpart III.A. Second, "individualized sentencing" is itself a mutated concept such that the term does not really capture what makes sentencing different now for judges. GARLAND, *supra* note 9, at 179–80 (explaining the trend toward punishment-at-a distance). Third, following Professors Carol Steiker and Jordan Steiker, individualization, along with notions of desert and fairness, reflect "different facets of the basic norm of equal treatment" central to the Supreme Court's death penalty jurisprudence. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 369 (1995). These principles extend to capital and noncapital sentencing alike. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1170 (2009). This article does not engage with the equality-based critiques of actuarial risk assessments. *See supra* notes 5, 20 & 75.

manage: manage the tools,[212] manage offenders,[213] and manage each other.[214]

The courts have not embraced regulating population-based sentencing tools. On this point, the federal guidelines are particularly instructive because, given their complexity and implementation, those guidelines represent the most explicit effort to push judges toward population-based sentencing. Thus, *Booker* is most illuminating to this point. There, the U.S. Supreme Court expanded procedural rights and simultaneously, effectively, took them away.[215] Rather than create a world where individual defendants have more rights and the courts stop sentencing, it created a world where individual defendants have the same rights and judges can keep sentencing under population-based sentencing tools.[216] In essence, what the U.S. Supreme Court did—and what it appears the state courts are trying to do—is to prevent population-based sentencing, even by just a hair. So, as policymakers push states further toward population-based sentencing, individual defendants may get more procedural rights. But eventually, the courts will create procedural rules to preserve the space for judges to con-

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212 *See, e.g.*, Slobogin, *Principles*, *supra* note 4 (proposing an evidentiary framework of fit, validity, and fairness around risk assessments at sentencing); *see also* State v. Guise, 921 N.W.2d 26, 34 (Iowa 2018) (suggesting changes to sentencing procedure that would allow the courts to manage the parties to regulate actuarial risk assessments).

213 *See, e.g.*, Garrett & Monahan, *supra* note 70, at 441–47 (encouraging the expansion of supervisory alternatives to prison sentences for judges to use with risk assessments at sentencing). In prior work, I have noted that the expansion of treatment programs for low-risk offenders, which appears non-controversial from a managerial framework, threatens to widen the net of people trapped in the carceral state, and can, unintentionally, sustain the prison population in the long run. *See, e.g.*, Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 223–25 (2013) (warning that the managerial logic behind predictive risk assessments and cost-efficiency driven sentencing reforms will not reduce mass incarceration). This article emphasizes that the whole nature of sentencing – not just what we do with defendants, but what judges are good for – shifts around the expansion of population-based sentencing tools, too.

214 *See, e.g.*, Garrett & Monahan, *supra* note 70, at 479, 492 (suggesting that sentencing guidelines should be more binding when they incorporate risk assessments and emphasizing the need for "increased scrutiny" where judges ignore risk assessments); Kevin R. Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, 38 BEHAV. SCI. L. 207, 207 (2020) (urging appellate enforcement of sentence outcomes on the basis of risk assessments) [hereinafter Reitz, *Compelling Case for Low-Violence-Risk Preclusion*].

215 *See supra* subpart III.A (describing the *Booker* rule that federal sentencing guidelines are advisory).

216 On this point, it is worth emphasizing that states did not have to follow the path set forth in *Booker*. *See* Cunningham v. California, 549 U.S. 270, 286 (2007) (summarizing the options before the states when faced with the jury trial right problem in *Booker*).

tinue sentencing individual defendants in the face of population-level tools.

In short, the sentencing process is not likely to change much, at least not any time soon. The courts are going to preserve the judge's choice to pass moral judgment on individual defendants even though this is increasingly what policymakers do not want them to do. And if they cannot do that, the courts will expand procedure in sentencing to make it increasingly burdensome to engage in outright population-based sentencing.[217] What they won't do—or at least have not done yet—is manage population-based tools through the sentencing process. Yet this is exactly what advocates of the trend toward population-based sentencing want the courts to do.

A. The Tension as Perilous

This tension is troubling on several accounts, none of them new to sentencing. Actuarial risk assessments do shape judicial sentence determinations,[218] just like sentencing guidelines have before them.[219] By refusing to engage with the tools, the

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217 *See id.* (suggesting that states can either expand the jury trial right at sentencing or make their sentencing guideline structures nonmandatory to avoid the fact-finding concern explored in *Blakely* and *Booker*).

218 *See, e.g.*, Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/S7X3-9P9M] (providing anecdotal evidence of COMPAS risk assessment's impact on judge's sentence determination in *Zilly* case); Megan T. Stevenson & Jennifer L. Doleac, Algorithmic Risk Assessment in the Hands of Humans 36–37 (Nov. 18, 2019) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489440 [https://perma.cc/V8L2-CQ6C] (finding that, based on empirical research in Virginia, "judges' decisions are influenced by the risk score" even though the tool is advisory in nature).

219 For example, even after the Supreme Court jurisprudence rendered the federal sentencing guidelines advisory, judges continue to adhere to the tools at sentencing to varying degrees. *See, e.g.*, Ryan W. Scott, *Inter-Judge Sentencing Disparity after Booker: A First Look*, 63 STAN. L. REV. 1, 4–5 (2010) (despite finding an uptick in variances from the guidelines, concluding that many judges still adhere to the federal sentencing guidelines even after they were rendered advisory and suggesting that, among other explanations, this may be because some judges "actually agree with the Guidelines' sentencing recommendations more often than their colleagues" or due to "institutional reasons, such as deference to the Commission or a belief that the Guidelines carry democratic legitimacy"); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268 (2014) (finding an uptick in interjudge disparities after *Booker* and attributing at least some of that disparity to mandatory minimums); *but see* U.S. SENT'G COMM'N, *Interactive Data Analyzer*, https://www.ussc.gov/research/interactive-data-analyzer [https://perma.cc/5UKG-A73A] (demonstrating that courts exercise the power to vary upward or downward from the guidelines after *Booker* about 20% of the time, while much more disparity in sentencing generates from government-sponsored motions).

courts legitimate their use whether judges can choose to sentence on different bases or not. If the courts do not regulate the tools, perhaps the tools will shape a judge's thinking in the normatively "wrong" way. Further, actuarial risk assessments, like sentencing guidelines, often lack meaningful judicial oversight in their design.[220] Perhaps, by refusing to engage with the tools through the sentencing process, judges will be influenced by a normatively "wrong" kind of population-based representation. Finally, the sentencing process, like much of criminal procedure, exists at cross-purpose with the underlying rationales behind these population-based sentencing tools, which orient around prevention rather than culpability.[221] If the courts do not engage with the tools, perhaps they will undermine criminal administration in more problematic ways.[222] These concerns are compelling. I leave it to others to continue exploring those possibilities in the literature in light of the continuities between actuarial risk assessments and earlier efforts to formalize judicial decision making around population-level representations of crimes and offenders.

Situating these tensions in the frame of population-based sentencing, however, expands the frame of critique. It creates a foundation to question not just the logistics of actuarial risk assessments at sentencing, but also the trend toward population-based sentencing as a persistent, political choice. To that end, perhaps the most perilous critique arising from the courts' approach to population-based sentencing tools concerns the

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220 This concern is obvious in the context of many popular RAIs, whose proprietary nature obscures their design features. *See, e.g.*, Nishi, *supra* note 67, at 188–90 (urging judicial oversight in the design of actuarial risk assessments used at sentencing). Yet even publicly developed sentencing guidelines lack judicial oversight in their design. *See* STITH & CABRANES, *supra* note 27, at 40 (emphasizing that the Sentencing Reform Act of 1984 lacked a "provision for citizens or other affected persons to obtain judicial review of the final rules issued by the sentencing commission" analogous to the Administrative Procedure Act).

221 Paul H. Robinson, *Punishing Dangerousness Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (warning that reforms like mandatory minimums and sentencing guidelines are driven by a logic of prevention at odds with criminal justice); Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, (2018) (noting the "significant fissure between principles restricting how risk is measured at sentencing and how risk is measured in actuarial sentencing"). *See also* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, NOTRE DAME L. REV. 317–24 (2015) (explaining the theoretical tension between a "culpability conception of punishment" and "predictive restraints" based on prevention).

222 *See* Goel et al., *supra* note 3, at 15–16 (raising the blameworthiness question around actuarial risk assessments at sentencing). *Cf.* Carol S. Steiker, *Punishment and Procedure: Punishment and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 808-09 (1997) (suggesting that preserving blaming as a social practice should be protected).

phenomenon of mass incarceration, which RAI advocates frequently invoke. Despite modest reductions in recent years, the United States remains the lead incarcerator in the world.[223] RAI advocates suggest that this population-based sentencing tool is necessary to reduce incarceration safely, or at least it could help along the way.[224] Perhaps, the argument might go, by preserving space for judges to keep sentencing on bases that are not population-driven, the courts contradict that socially beneficent end.[225] That policy argument raises a question about what mass incarceration is, actually. If the problem of mass incarceration is simply a quantitative matter of too much incarceration, perhaps the courts' response is problematic.[226] If, as I believe, the problem of mass incarceration reflects deeper, structural issues in society, there is promise in the tension between the courts' jurisprudence and RAI advocates aims, discussed below.

B. The Tension as Promising

The courts' resistance to managing population-based sentencing tools presents an interest convergence between the courts and the small, but fierce contingent of scholars and policymakers who oppose the expansion of actuarial risk assessments at sentencing, and in criminal administration more broadly, for reasons to do with the structural realities of criminal law enforcement in the era of mass incarceration.

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223 WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019 1 (2020) (noting that the U.S. prison population has modestly declined since 2009).

224 In identifying low risk defendants suitable for diversion from prison sentences, RAIs at sentencing may "conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders' families, and communities." MODEL PENAL CODE § 6B.09 cmt. d (AM. LAW INST., Proposed Final Draft 2017). Advocates further suggest that the introduction of more consistent, transparent, and automated predictions of recidivism compared to clinical assessments may reduce the threat of individual bias in judicial decision making. *See id.* Advocates tend to frame RAIs as an important component to reducing mass incarceration while maintaining public safety because the tools can identify those low-risk persons best suited for diversion from prison sentences. MODEL PENAL CODE § 6B.09 cmt. d (AM. LAW INST., Proposed Final Draft 2017).

225 *C.f.* MEGAN STEVENSON & JENNIFER DOLEAC, AM. CONS. SOC'Y, ROADBLOCK TO REFORM 7 (2018) (suggesting that judges who do not follow RAIs recommendations at sentencing are frustrating the tools' potential to reduce incarceration in Virginia).

226 *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 268–71 (2018) (distinguishing between "over" and "mass" criminal justice reforms).

Every day, judges sentence individual defendants across this country. The state courts' emerging jurisprudence rightfully recognizes that sentencing has not been, and should not be, based solely on technical—nor subjective—assessments of recidivism risk. At best, actuarial risk assessments provide a piece of information that may inform pursuit of the utilitarian aims of punishment, in particular incapacitation.[227] Adopting RAIs into the sentencing process does not eliminate the other theories of punishment.[228] More importantly, however, the assessments do not account for the socially constructed dimensions of crime or punishment.[229] Judges can take account of these realities at sentencing, and they should be encouraged to do so. The sentencing process is designed for them to do so.[230]

The courts' jurisprudence around population-based sentencing reflects a normative judgment about the nature of sentencing. If the U.S. Supreme Court had collapsed the jury trial

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227 RAIs are controversial in part because they only fit with utilitarian aims of punishment. *See supra* note 64. As I have explained elsewhere, current RAIs do not accord with punishment theory, even incapacitation. *See* Eaglin, *Constructing*, *supra* note 56, at 99–100. For recent scholarship that explores the thin line between using RAIs to further rehabilitation and incapacitation at sentencing, see Collins, *supra* note 221, at 87–89. For a critique of how the discourse between the diverging theories of punishment can encourage overpunishment, see Carol S. Steiker, *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration*, *in* THE BOUNDARIES OF CRIMINAL LAW 27, 49 (R.A. Duff et al. eds., 2010) ("[B]oth retributivism and social welfare theory, as discourses deployed in the current world, will tend toward overpunishment, even when policy makers and discretionary institutional actors self-consciously and in all good faith see themselves as trying to promote their appropriate ends.").

228 *See* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 16–23 (2010) (describing the dominant theories of punishment and noting the ascendance of utilitarian theories).

229 Even a transparent, well-designed actuarial risk assessment cannot fully grapple with the realities of punishment in society because structural forces shape crime enforcement and so permeate the entire tool design process, from the selection of data to the selection of risk factors to the creation of risk categories. *See generally* Eaglin, *Constructing*, *supra* note 56. That RAIs eschew focus on social and governmental forces at sentencing is part of their problematic appeal. *See* Eaglin, *supra* note 8, at 534–36 (framing the tools as neorehabilitative and explaining how "the language of technical accuracy [around RAIs at sentencing] disaggregates crime from social and governmental forces and instead focuses on individual character and responsibility") (internal quotation marks omitted).

230 As Professor David Garland explains, criminal justice decisions were underpinned by a social style of reasoning for much of the twentieth century. GARLAND, *supra* note 9, at 188. This would include the sentencing process that emerged in this time period. *See supra* subpart I.A. An "economic" style of reasoning has emerged with the rise of population-based sentencing tools, which presents "crime as an externality of normal social interactions or which conceive crime as the outcome of reasoned, opportunistic choices." GARLAND, *supra* note 9, at 189.

right into the guideline driven sentencing process, it would have tolerated more population-based sentencing, too. The Court rejected that approach.[231] State courts' emerging RAI-informed sentencing jurisprudence adopts a similar position. While individual defendants are not succeeding in their appeals, state courts are using procedural challenges to further a vision of sentencing as a unique point in the criminal process where judges can pass moral judgment on individual defendants.[232] In so doing, they create the space for judges to "resist[ ] the allure of (depersonalized) personalization" and, by default, assert the "sociality" of sentencing.[233] From a perspective that considers standardization neither value-neutral nor inherently beneficial at sentencing, the emerging jurisprudence is worthy of further consideration. The courts' response to population-based sentencing tools "promotes a particular vision of society" and punishment distribution.[234] That vision is deeply humanist.

At the same time, scholars and policymakers persistently object to the expansion of RAIs in criminal administration for structural reasons. RAIs produce racial disparities because they rely on historical data generated in a deeply racially and economically stratified society defined by an expanding carceral state.[235] Common predictive risk factors like gender, age, socioeconomic status, and criminal history are far from objective in this sociohistorical context because mass incarceration disproportionately affects marginalized communities, particularly African Americans with less than a high school degree from urban centers.[236] From this perspective, the indi-

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231 *See supra* notes 149–64.

232 *C.f.* Roberts, *supra* note 126, at 1722 (suggesting that the shortcoming in due process approaches to automated government decision making systems lies in the reality that "some government decisions should not be automated at all because automation itself makes adjudication undemocratic").

233 RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 17 (2019).

234 Meares & Harcourt, *supra* 145, at 745.

235 *See* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 240 (2015) (analyzing the role of criminal history in actuarial risk assessments and concluding that "relying on prediction instruments to reduce mass incarceration will surely aggravate what is already an unacceptable racial disproportionality in our prisons") [hereinafter, Harcourt, *Proxy*]; *c.f.* Devon W. Carbado, *Blue on Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485 (2016) (describing a variety of social forces that make African-Americans vulnerable to ongoing police surveillance and contact).

236 Eaglin, *Technologically Distorted*, *supra* note 8, at 527 (explaining that the factors used to predict recidivism risk "reflect the realities of social neglect and susceptibility to police surveillance"). For a recent investigation of the impact

vidualizing emphasis on prediction, automation, and historical data collected in the era of mass incarceration as the method to reform sentencing is itself a problem.[237] Encouraging the use of predictive tools that reflect problematic features of the carceral state threatens to further entrench mass incarceration as a particular mode of governance that operates to manage and control marginalized populations through the carceral state rather than offer support and resources outside it.[238] Moreover, it threatens to obscure through reform at the margins the deeper problem that this phenomenon reflects—the structural exclusion of marginalized people from society.[239] For opponents of RAIs in the era of mass incarceration, expanding individual procedural rights cannot fix the structural problems that the tools expose at sentencing.[240]

For the courts, actuarial risk assessments are problematic to the extent that advocates may use this population-based sentencing tool to frustrate their ability to pass moral judgment upon individual defendants in social context. Though such conditions have not come to pass yet, there is very good reason to think that they will be used to that end, and soon. For example, scholarship and public policy debates are starting to query how to make courts adhere to RAIs' results more fre-

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RAIs may have on Latinx people as well, see generally Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553 (2019) (noting the dearth of scholarship exploring RAIs' impact on Hispanic populations and demonstrating the issue through a study of pretrial bail algorithms). For a seminal study demonstrating the concentrated effect of mass incarceration on marginalized black communities, see BRUCE WESTERN, PUNISHMENT & INEQUALITY IN AMERICA 30 (2006).

237 Eaglin, *Technologically Distorted*, *supra* note 8, at 535 (critiquing the individualist rhetoric of accuracy as a frame to engage with the expansion of RAIs at sentencing).

238 Roberts, *Digitizing the Carceral State*, *supra* note 126 (arguing that RAIs "reflect and implement a carceral approach to social problems" endemic to the larger transformation of the carceral state upon which mass incarceration emerges).

239 Eaglin, *Technologically Distorted*, *supra* note 8, at 536 ("To concede on the basis of politics to the expansion of risk tools threatens to mask the very difficult problems of historical change that create the foundation for their very expansion"). *Cf.* BENJAMIN, *supra* note 233, at 5–6 (warning that "the employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or more progressive than the discriminatory systems of a previous era" are dangerous in part because "once something or someone is coded, this can be hard to change").

240 Roberts, *supra* note 238, at 1721–24 (illuminating the potential and limits of due process critiques of big data, and urging a more radical approach to the trend toward digitizing the carceral state); *c.f.* Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2198 (2013) (warning that the expansion of criminal procedural rights are particularly problematic when critiquing the intersection of race, poverty and the carceral state).

quently. In a recent article, Professor Brandon Garrett and Dr. John Monahan suggest giving RAIs a "presumptive" effect at sentencing, so that more offenders' sentences will turn on their risk scores.[241] Professor Kevin Reitz urges something similar, querying how to get appellate courts to enforce sentencing rules based on actuarial risk scores.[242] Policymakers, too, are exploring ways to make sentence outcomes accord with RAIs.[243] In unison or independently, these developments may change the courts' perspective on actuarial risk assessments at sentencing.

Thus, between RAI opponents and the courts, an unlikely interest convergence is developing.[244] The courts have an interest in preserving the sentencing process, including the traditional space for judges to pass moral judgment on individual defendants. To do that, they will need to resist the pressure to manage actuarial risk assessments through the sentencing process. A way to do that is to resist the trend toward popula-

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241 Garrett & Monahan, *supra* note 70, at 479–80 (querying whether to make RAIs "presumptive" in effect at sentencing).

242 Reitz, *Compelling Case for Low-Violence-Risk Preclusion*, *supra* note 214, at 207–08 (suggesting that RAIs should be an important component to "presumptive decision rules that prohibit the imposition or continuation of prison terms for . . . carve-out groups" and urging appellate enforcement of such rules).

243 MEGAN STEVENSON & JENNIFER DOLEAC, AM. CONS. SOC'Y, ROADBLOCK TO REFORM 8-9 (2018) (reflecting on relationship between judges, actuarial risk assessments, and decareral efforts); *Evidence-Based Sentencing*, CTR. FOR SENT'G INITIATIVES, https://www.nscs.org/csi/evidence-based-sentencing [https://perma.cc/B8GB-RDSV] (last visited Oct. 24, 2020) (encouraging RAI-informed sentencing for probation-eligible offenders). Policymakers condition funding to state agencies based on adoption of actuarial risk assessments, though this practice has not been implemented in the context of state courts yet. *See, e.g.*, OHIO JUDICIAL CONFERENCE, POLICY STATEMENT ON THE OHIO RISK ASSESSMENT SYSTEM AND RISK AND NEEDS ASSESSMENT TOOLS 2–3, (2015), http://ohiojudges.org/Document.ashx?DocGuid=9e4c2814-6ffa-4018-9156-88fea13bf95e [https://perma.cc/MZF2-Q54S] (warning that "reliance or non-reliance on risk assessment tools should not be used to determine grant funding to courts" in response to passage of House Bill 86 in 2011); *see also* OHIO REV. CODE ANN. § 5120.1111(d) (West 2020) (conditioning funding to correctional facilities on the basis of RAI scores in offenders).

244 *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]his principle of interest-convergence provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."). Aya Gruber characterizes this principle in the context of sentencing reform as "the phenomenon of racial justice remedies succeeding when they reflect the agenda of empowered lawmakers and constituencies." Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1341 (2018). To the extent that these tools are offered as a solution to reduce the threat of racial bias, actuarial risk assessments resonate of this critique. However, this Article uses the term to illuminate a convergence of interests that may, quite unexpectedly, inure to the benefit of marginalized defendants.

tion-based sentencing. The existing jurisprudence on population-based sentencing demonstrates courts are inclined to adopt that route.

That endeavor—of sentencing individual defendants in social context rather than engaging in population-based sentencing—is, in reality, a critique of the cultural and political assumptions that shape this historical present. Actuarial risk assessments reflect the advance of a particular kind of abstract penal knowledge that only makes sense in a particular social context. The institutionalization of actuarial risk assessments at sentencing, even for the well-intentioned purpose of reducing incarceration in the states, not only extends the trend toward population-based sentencing, but it also expands what Professor David Garland describes as the "culture of control." As Garland explains, "the risky, insecure character of today's social and economic relations is the social surface that gives rise to our newly emphatic, overreaching concern with control [in criminal administration] and to the urgency with which we segregate, fortify, and exclude [through the carceral state]."[245] The impulse to control sentence outcomes through technical, abstract representations is deeply connected to this social reality, which encompasses the high rate of incarceration in this country, but really expands beyond it. The tools only make sense if we are "increasingly less tolerant and . . . increasingly less capable of trust" in judges and the kind of contextualized penal knowledge they can produce.[246] More recent critiques of actuarial risk assessments in particular expand upon this insight by suggesting that population-based sentencing tools also make sense in a society committed to "acting without understanding."[247] This, too, is an extension of Professor Garland's culture of control, in the sense that the tools make sense in a society that is increasingly willing to create "new structures of controls and exclusions directed against those groups most adversely affected by the dynamics of economic and social change."[248] Challenging the assumptions that shape this present, including those that create practices that disproportion-

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245 GARLAND, *supra* note 9, at 194.

246 *Id*. at 195.

247 AAS, *supra* note 7, at 86 (suggesting that actuarial risk assessment "are not instruments for understanding, but instruments . . . that make it possible to act without needing to understand."); VIRGINIA EUBANK, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 176–78 (2017) (critiquing the turn toward technologies in the welfare space as propelling the "cognitive dissonance required to both see and not see reality").

248 *Id*.

ately, and adversely affect the most marginalized among us, is exactly what RAI opponents set out to do.[249] Because the courts and RAIs' opponents are most sensitive to these two trends, we might expect that at some point, their interests converge. This Article invites scholars to see the emerging sentencing jurisprudence around actuarial risk assessments in just such a light.

That being said, if the courts are committed to preserving the sentencing process and the space for judges to pass moral judgment on individual defendants at sentencing, they will need to vindicate a qualitatively different kind of sentencing process grounded in active rather than passive judicial thinking. For sentencing judges, it means explaining sentences on the record. This kind of explanation does not mean simply stating that the court took other factors into consideration other than actuarial risk scores to avoid appeal. Rather, it means bucking the trend toward population-based sentencing and explaining how the commission of this crime by this defendant in this social context led to this particular sentence. The point is not for courts to "override" an actuarial risk score with their own prediction of future behavior,[250] but rather to engage with and ground a sentence in the rich sociological realities that illuminate a judge's institutional expertise at sentencing. To that end, resistance also means exercising what Professor Carol Steiker has described as "prudential mercy."[251] Rather than grounding a notion of moral judgment in the competing theories of punishment, prudential mercy invites judges to pass judgment from a position of doubt and discomfort that punishment in the carceral state is appropriate in the era of mass incarceration.[252] While conventional wisdom suggests

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249 *See, e.g.*, Roberts, *supra* note 238, at 1725 ("[I]mproving risk assessment procedures within multiple interlocking systems designed to exclude black people from social, economic, and political participation threatens to obscure these procedures' antidemocratic functions and make them operate more efficiently. The only way to address the digitized carceral state is to dismantle its social institutions that enforce a racial caste system and reconstitute them in radically new ways."); BENJAMIN, *supra* note 233, at 11 (urging that we "pull[ ] back the curtain" on purportedly neutral technologies to "draw attention to forms of coded inequity" in the tools and in society).

250 In fact, I would encourage judges to avoid the word entirely. What a judge does at sentencing is far more sociologically situated than anything a tool can recreate.

251 *See* Steiker, *supra* note 227, at 49–54 (describing the contours of a theory of prudential mercy).

252 *Id*. at 50 (urging discretionary actors, including sentencing judges, to adopt "an openness to doubt whether even our best, good-faith attempts to translate punishment theory into practice will lead us astray [in the era of mass incarcera-

that such doubt should be highest where risk is low, a deconstructed and sociologically-rich account of the structural factors that produce recidivism risk invites judges to believe that such doubt may be highest where an individual defendant's risk score is high.[253]

Consider, as example, the sentencing of Eric Loomis. Mr. Loomis, age 32, pled guilty to attempting to flee a traffic officer and operating a motor vehicle without the owner's consent as repeat offenses.[254] The court sentenced Mr. Loomis to six years of incarceration in prison with reference to the COMPAS tool that characterized him as high risk of violence, high risk of recidivism, and high pretrial risk during his sentencing colloquy.[255] We know that the court considered this offense as "extremely serious" and that it believed that Mr. Loomis drove the car while someone else shot a gun out the window.[256] But the court did not explain why Mr. Loomis engaged in this behavior, and whether that should make him more or less culpable in this instance.[257] We know that Mr. Loomis had a criminal history, including serving probation for delivering prescription drugs in 2012. But there is no reference to the structural lack of access to drug treatment outside the carceral state pervasive in Wisconsin due to state and local refusal to invest in such programming, including the southwestern part of the state from which Mr. Loomis hails.[258] Such information contextualizes Mr. Loomis's characterization as high risk. For example, the lack of access to such resources may relate to his criminal history, his history of drug addiction, and his sporadic

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tion], and a willingness therefore to moderate or even forgo otherwise authorized punishment, at least in cases where our doubts are strongest.").

253 For a recent, philosophically grounded argument that points to the same conclusion, see Christopher Lewis, Mass Incarceration, Risk, and the Principles of Punishment (unpublished manuscript) (draft on file with author).

254 *See supra* note 119; *see also* Anne Jungen, *Man Gets 8.5 Years in Drive-By Shooting Case*, LACROSSE TRIBUNE (Aug. 13, 2013), https://lacrossetribune.com/news/local/driver-gets-8-years-in-drive-by-shooting-drug-case/article_b0fbb83e-03d3-11e3-8b4b-001a4bcf887a.html [https://perma.cc/8NCR-X575].

255 *Loomis*, 881 N.W.2d at 756 & n.18; *see also supra* note 183.

256 Mr. Loomis contested this point. *See* Brief of Plaintiff-Respondent in State v. Loomis, 2016 WL 485419 at *3–4 (Jan. 19, 2016).

257 Instead, the court emphasized the need to protect the public, including that Loomis was high risk. *See id.* at *4.

258 Parker Schorr, *Across Wisconsin, Meth Use Balloons in the Shadow of the Opioid Crisis*, WISCONTEXT (Oct. 16, 2019), https://www.wiscontext.org/across-wisconsin-meth-use-balloons-shadow-opioid-crisis [https://perma.cc/CL2Q-6PDY].

job history, too.[259] These socially contextualized facts may offer insight to how Mr. Loomis ended up driving the car on the night in question. All of these sociological realities are captured in actuarial risk assessments currently used at sentencing, whether proprietary and publicly developed in origin.[260] When disaggregated from one another, these predictive risk factors paint a very different picture of this defendant. By actively deconstructing the tools and analyzing their significance in creating the conditions under which Mr. Loomis conducted this crime, a judge might think more deeply about this defendant in this case at sentencing. Perhaps this analysis would suggest that Mr. Loomis's case is one where the judge should doubt whether this extensive term of incarceration for this crime of conviction is the appropriate sentence. Such an analysis also may not, in this case or others, lead to that conclusion.[261] Either way, it would substantiate the qualitatively different kind of sentencing process within which the lack of procedural rights makes some sense.

To that end, appellate courts have an important role to play in this kind of resistance, too. If the appellate courts are not going to manage population-based sentencing tools or expand procedural rights in the sentencing process, they, too, have to foster the qualitatively different kind of sentencing process where lack of procedural rights makes some sense. Appellate courts can do this in a number of ways. The courts should actively create a socially contextualized frame pertinent to the individual offender when analyzing the individual sentence. Rather than framing their opinions around the technicalities of the tools, the court could foreground the deeper analysis that sentencing judges do, or should do, at the start of their appellate decisions when reviewing a sentence where a judge considered an actuarial risk assessment. These courts may also raise the voice of actuarial risk assessments' opponents in the juris-

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259 *See id.* (describing the experience of a Wisconsin woman who lost her job and spent time in jail waiting for access to a drug treatment program).

260 *See supra* note 55 and accompanying text (listing common actuarial risk assessment predictive factors).

261 Even if unequally distributed, contextualized mercy is better than no mercy at all. *See* Steiker, *supra* note 227, at 55–56. To the extent that advocates already suggest that low-risk defendants should be diverted from incarceration, see *supra* notes 219–20, this approach would not contravene that impulse. Rather, it expands it while creating the foundation for the production of different social meaning from such efforts. Jessica M. Eaglin, *The Categorical Imperative as a Decarceral Agenda*, 104 MINN. L. REV. 101, 119–20 (2020) (critiquing the shortcomings of the efficiency frame in advancing decarceral sentencing reforms, including RAIs).

prudence. Recent cases have done an excellent job in referencing the ongoing debates about the tools, including concern that they produce racial disparities.[262] Yet courts will need to go further, by situating those debates within the review of a judge's sentence for a particular defendant. They could also ground their review of the sentence by referencing structural realities evident in a particular case and pertinent to the ongoing debates.

This avenue for resistance is second-best, and likely unsatisfactory to many readers. This account generates from the social reality that population-based sentencing tools cannot escape the deep, structural inequities in society from which they emerge.[263] There are other ways to engage with the design of actuarial risk assessments used at sentencing. In earlier work, I have urged expansive transparency, accountability, and interpretability measures in the development and adoption of RAIs at sentencing that can address at least some of the procedural concerns that defendants raise in the courts at this moment.[264] Central to that contribution is the notion that so-

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262 *See, e.g.*, *Loomis*, 881 N.W.2d at 256, 268, 270 (citing to various legal articles regarding the design of actuarial risk assessments); *Guise*, 921 N.W.2d at 31 n.1–2 (citing to various articles on actuarial risk assessments in criminal administration); *Guise*, 919 N.W.2d (same).

263 Perhaps this means the problem lies in the courts' unwillingness to engage with the equal-protection-based critiques launched at the tools. *See* Goel et al., *supra* note 3 (critiquing the *Loomis* court for avoiding the equal protection claim about actuarial risk assessments' design); Huq, *supra* note 5, at 1055 (suggesting that actuarial risk assessments may be used if they are designed to counteract racial stratification); Starr, *supra* note 20 ("To be sure, the state has an important (even compelling) interest in reducing crime without unduly increasing incarceration. But contrary to other commentators, I do not think this interest can justify the use of demographic and socioeconomic variables in [RAI-based sentencing]. A careful review of the empirical evidence and methods underlying the instruments show that their use does not substantially advance the state's penological interests and that less discriminatory alternatives would likely perform at least as well."). I have my doubts on this point. *See, e.g.*, Ben Green, *The False Promise of Risk Assessments: Epistemic Reform and the Limits of Fairness*, F.A.T. (Jan. 27–31, 2020) (critiquing debates about actuarial risk assessment design and fairness in the context of pretrial bail assessments, and calling for epistemic shifts in the way we interpret the issue of algorithmic fairness). Much more can be said on this topic, but it will have to wait for future work.

264 *See* Eaglin, *Constructing*, *supra* note 56, at 110–21. For example, I argue there that "state and local government bodies could create statutes or ordinances that require specific disclosures if the tools are used for the administration of justice." *Id.* at 113. Professor Aziz Huq makes a similar point when he urges the expansion of ex ante regulation to address constitutional and public policy concerns raised by machine learning tools. Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875, 1945 (2020) (suggesting ex ante adoption of tools that use "'simple rules' that perform (almost) as well as complex instruments yet are far more readily comprehensible."). This, in turn, would allow judges to deconstruct the tools when sentencing. My point, again, is

ciety cannot adopt a passive role in response to the expansion of actuarial risk assessments as a key site in producing social knowledge used to distribute resources through criminal administration. I argue there that law must play an important role in facilitating deep contestation and engagement in this kind of knowledge production by grounding the design and adoption of the tools in normative, social values rather than technical ones.[265]

This contribution builds from that observation, with a particular focus on the courts. The nature of sentencing is changing, and courts must adjust. Fundamentally, this transformation relates to the format of knowledge. Though population-based tools make sentencing appear more formal and more abstract, judges are uniquely positioned to create a counterbalance when passing judgment on individuals at sentencing. They will need to produce narratives grounded in local knowledge that critique the systemic level representations of crime and offender. They will need to embrace thinking about the structural context in which an individual appears before court rather than resigning to population-based representations as the only kind of knowledge that matters at sentencing.[266] This kind of thinking is hard, but necessary.[267] In the era of mass incarceration, sentencing constitutes an act that leads to the distribution of punishment; but it is also a key space where law engages in its sense-making function within society.[268] From the narratives that a judge constructs in sentencing colloquies to the written opinions produced by the higher courts, law shapes society's "common sense" understandings of the world. Through this kind of knowledge pro-

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not to encourage judges to adjust their own prediction of risk by discounting certain factors included in a tool. Rather, I encourage judges to seek understanding, via the identification of factors used to predict risk, of the social conditions that may contribute to this defendant's appearance before the court.

265 Eaglin, *Constructing*, *supra* note 56, at 63–64, 107–07.

266 *See* Eaglin, *Technologically Distorted*, *supra* note 8, at 501–02 (critiquing the technical orientation of debates about actuarial risk tools' advance as lopsided and urging a turn to social transformation that sustain the advance of the tools and legitimate the expansion of the carceral state).

267 *See* Cecelia Klingele, *The Promise and Peril of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 580 (2016) ("If those in the criminal justice system do not consciously articulate the values that animate their use of state power, then the tools they use take on a life of their own, imposing bureaucratic values, such as efficiency and risk aversion, in place of the moral principles that have long justified the exercise of penal power.").

268 Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) (law exerts power "less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person wants to live.").

duction, the courts can actively contest the passive response to the expansion of technologies in the carceral state and the resignation to a status quo embedded within them.[269] The population-based sentencing frame demonstrates that the courts can achieve this end not through intensive, procedural regulations of sentencing technologies, but through the production of other narratives grounded in social rather than technical concerns.[270]

To be sure, the courts' approach to population-based sentencing technologies does not guarantee that judges will adopt this active role. At best, the jurisprudence creates the space for such analysis. Yet, perhaps the space to embrace a different kind of penal knowledge at sentencing grounded in both "compassionate concern for the offender, rather than some more instrumental end" and sincere doubt about the expansion of the carceral state is a place to begin to think differently in this historical moment.[271] Perhaps, by thinking about the tools as part of the larger trend toward population-based sentencing, judges will see the possibilities that lie in actively thinking about sentencing from a position of sincere doubt. Perhaps, as the courts start engaging with actuarial risk tools from a position oriented around their institutional expertise to sentence in social context, they can raise awareness to the larger, structural problems that need to be addressed in society. Scholars and courts should further ponder these possibilities.

On a deeper level, however, this Article places the jurisprudence around actuarial risk assessments in conversation with the jurisprudence that emerged around earlier population-based sentencing tools to compel scholars to think more critically about how and why we as society are choosing to employ technologies at sentencing in this historically contextualized moment. Individualizing, population-based technologies are expanding in criminal administration as "solutions" to issues that build from and reflect deep, structural problems at the intersection of criminal administration and society.[272] The ex-

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269 Eaglin, *Technologically Distorted*, *supra* note 8, at 486–87 (connecting the advance of actuarial risk assessments with transformations in social notions critical to sustaining the expansion of the carceral state).

270 In this sense, this approach could embody a "demosprudence of poverty" that utilizes procedural due process challenges to "recognize substantive and structural matters of poverty while staying within the ostensible confines of current doctrine." Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1477 (2020).

271 Steiker, *supra* note 227, at 50.

272 BENJAMIN, *supra* note 233, at 17.

pansion of such tools is not inevitable, and worthy of critical reflection in each space in which they appear. In the post-conviction sentencing context, the tools raise deep tensions that build from a long history of transformation to the nature of sentencing. By preserving the sentencing process and the space for judges to actively pass judgment on individual defendants in social context, courts remind us that this present does not have to be our present. There are other ways to respond to mass incarceration, and other ways to guide judicial sentencing discretion. Judges surely need and appreciate guidance to help inform their awesome responsibility at sentencing. But why not provide guidance that plays to their strengths, like descriptive accounts of important sentence considerations,[273] rather than implement population-based tools that are more and more technical, more and more abstract, and less and less within the institutional expertise of sentencing judges?[274] Why not address mass incarceration by investing in marginalized communities most affected by the phenomenon outside the carceral state, rather than investing in individualizing technologies to target them within it?[275] Why not reduce long prison sentences through finite caps on sentence length, rather than seeking to enhance social control over individual judges?[276] These questions are both cultural and political. If they appear beyond critique, it is because we make assumptions about what is possible in this historically-shaped present. Quite unexpectedly, when viewed in the frame of population-based sentencing, the jurisprudence on actuarial risk assessments can sustain those deeper questions. Engaging with those questions, in turn, creates the space to think differently about this present and, possibly, imagine different, more inclusive futures. This Article invites others to consider those possibilities in light of this jurisprudence going forward.

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273 *See, e.g.*, Alschuler, *Failure of Sentencing Guidelines*, *supra* note 42, at 941–45.

274 *See, e.g.*, Garrett & Monahan, *supra* note 70, at 446, 488–89 (urging judicial training on RAIs).

275 *See* Eaglin, *Technologically Distorted*, *supra* note 8, at 541 (urging reflection on the relationship between actuarial risk assessments' expansion and deteriorating social conditions for marginalized communities).

276 *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 233 (2017) (suggesting a cap on prison sentences for all offenses and decriminalizing low-level offenses).

CONCLUSION

This Article situates the trend toward institutionalizing actuarial risk assessments in state sentencing processes as the extension of a larger trend toward population-based sentencing. It connects the emerging sentencing jurisprudence around actuarial risk assessments at sentencing with the jurisprudence that developed around the federal sentencing guidelines in the 2000s. By analyzing these seemingly disparate sets of case law in tandem, this Article illuminates how courts resist the trend toward population-based sentencing. They expand procedural rights at sentencing and create procedural rules that preserve the space for judges to continue passing moral judgment on individual defendants. This response exists in tension with the academic and policy-driven trend toward population-based sentencing. Though this tension hardly offers a fix to the problematic implications of these tools' advance, it creates the space to think differently about this current moment. This Article invites scholars and courts to do so going forward.